JURISDICTIONAL STATEMENT

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,
Appellees.

On Appeal
From The United States District Court
For The District Of Columbia

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the prohibition on political parties' solicitation and expenditure of "nonfederal money" imposed by the Bipartisan Campaign Reform Act of 2002 is unconstitutional as applied to political activities that, when funded by nonfederal money, do not create a risk of actual or apparent *quid pro quo* corruption of federal officeholders.

APPENDIX A: Opinion of the United States District Court for the District of Columbia 1a

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JURISDICTIONAL STATEMENT

Appellants Republican National Committee ("RNC"), California Republican Party, Republican Party of San Diego County, and Michael Steele respectfully submit this jurisdictional statement in support of their appeal from the judgment of the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the three-judge district court is not yet published but is electronically reported at 2010 WL 1140721. J.S. App. 1a.

JURISDICTION

The judgment of the three-judge district court was entered on March 26, 2010. The notice of appeal was filed on April 2, 2010. The jurisdiction of this Court is invoked under § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 113-14. Under § 403(a)(4) of BCRA, it is "the duty of" this Court "to advance on the docket and to expedite to the greatest possible extent the disposition of th[is] . . . appeal." *Id.* at 114.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of BCRA are reproduced in the appendix to this jurisdictional statement.

STATEMENT

The "'freedom to engage in association for the advancement of beliefs and ideas'"—including through "partisan political organization"—"'is an inseparable aspect'" of the First Amendment. *Tashjian*

servative Political Action Comm., 470 U.S. 480, 497 (1985)).

The government must therefore justify *each* application of BCRA's prohibition on nonfederal money by demonstrating that the restriction is necessary to prevent actual or apparent *quid pro quo* corruption of federal officeholders. But *Citizens United* also makes clear that the danger of *quid pro quo* corruption arises with extraordinary infrequency. Independent expenditures, for example, *never* create a material risk of actual or apparent *quid pro quo* corruption—no matter the size of the expenditure. *Citizens United*, 130 S. Ct. at 908-09. Thus, to uphold the application of BCRA's prohibition on nonfederal money, the Court would have to indulge the farfetched supposition that, while a multimillion-dollar independent advertising campaign cannot be a vehicle for *quid pro quo* corruption, the risk that a candidate would be willing to sell his vote in exchange for a donation to his party's get-out-the-vote drive is so dire that Congress can constitutionally prohibit *all* donations of nonfederal money. That assumption is not only facially implausible but is also unsupported by anything in the congressional record accompanying BCRA's enactment. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 481 (D.D.C. 2003) (Kollar-Kotelly, J.) ("The record does not contain any evidence of bribery or vote buying in exchange for donations of nonfederal money . . . .").

Because the government cannot meet its burden of establishing that BCRA's prohibition on nonfederal money is constitutional in any of the applications challenged by appellants, probable jurisdiction should be noted.

1. Prior to the enactment of BCRA, federal law imposed source and amount limitations on contributions to political parties made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Federal law placed no limitations, however, on the right of political parties to solicit and spend nonfederal—or "soft"—money for other purposes, including "to help fund issue ads" and "purely state and local election activities." J.S. App. 4a. The solicitation and expenditure of nonfederal money was subject solely to state-law restrictions. Federal law also permitted parties to use a combination of federally regulated money and nonfederal money to fund "mixed-purpose activities (for example, get-out-the-vote and voter registration in years when federal, state, and local candidates are all on the ballot)." *Id.*

BCRA imposed a blanket federal prohibition on national parties' use of nonfederal money for *all* purposes. BCRA added § 323(a) to the Federal Election Campaign Act of 1971 ("FECA"), which prohibits national political parties and their agents from soliciting, receiving, directing, or spending funds "that are not subject to the limitations, prohibitions, and reporting requirements of th[e] Act." 2 U.S.C. § 441i(a)(1). Thus, a national party cannot solicit or spend annual contributions of more than $30,400 (indexed for inflation) from any individual donor, or accept any contributions from corporations and unions, even if those contributions would be spent on state election activities completely unrelated to a federal campaign and would fully comply with state law. *Id.* § 441a(a)(1)(B); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435, 7437 (Feb. 17, 2009).

BCRA also added FECA § 323(b), which prohibits state and local parties from soliciting or spending nonfederal money on "Federal election activity." 2 U.S.C. § 441i(b)(1). State and local parties thus cannot solicit or spend contributions of more than $10,000 annually from any individual donor, or accept any contributions from corporations and unions, to fund (1) "voter registration activity" that occurs in the 120-day period preceding a federal election; (2) "voter identification," "get-out-the-vote activity," or "generic campaign activity" that is conducted "in connection with" an election in which there is a federal candidate on the ballot; or (3) any "public communication" that promotes, supports, attacks, or opposes a clearly identified federal candidate. *Id.* § 431(20)(A)(i)-(iii); *see also id.* § 441a(a)(1)(C).[1]

In *McConnell*, this Court upheld FECA § 323 against a facial First Amendment challenge. 540 U.S. at 161, 173.

2. In 2008, appellants filed this as-applied challenge to the restrictions that FECA §§ 323(a) and (b) impose on the First Amendment speech and associational rights of political parties and their members.

The RNC and its Chairman alleged that FECA § 323(a) was unconstitutional as applied to their solicitation and expenditure of nonfederal money to (1) support candidates in 2009 state elections in New Jersey and Virginia, where there were no federal candidates on the ballot, (2) support state candidates in elections where both federal and state candidates are on the ballot, (3) finance state Republican par-

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[1] "Generic campaign activity" is campaign activity that promotes the political party but does not promote any specific federal, state, or local candidate. 2 U.S.C. § 431(21).

ties' redistricting efforts after the 2010 census, (4) fund "grassroots lobbying" efforts to educate voters about legislative issues and mobilize grassroots movements regarding such issues, (5) fund litigation in cases not involving federal elections, and (6) pay for the maintenance and upkeep of the RNC's national headquarters. The California Republican Party and Republican Party of San Diego County alleged that FECA § 323(b) was unconstitutional as applied to their solicitation and expenditure of nonfederal money to (1) campaign for or against California ballot initiatives using advertisements that featured federal candidates and (2) fund get-out-the-vote drives and other generic campaign activity not targeted to the campaign of any specific federal candidate.

A three-judge district court was convened pursuant to BCRA § 403(a)(1). The parties filed cross-motions for summary judgment. In support of its motion, the RNC submitted affidavits stating that it will not "'use any federal candidates or officeholders to solicit' soft-money contributions" or "'aid' soft-money donors 'in obtaining preferential access to federal candidates or officeholders.'" J.S. App. 8a. The district court delayed resolution of the summary judgment motions pending this Court's decision in *Citizens United*, and then ordered supplemental briefing regarding the potential implications of that decision.

3. Deeming itself bound by this Court's facial holding in *McConnell*, the district court denied appellants' motion for summary judgment and granted summary judgment to the FEC. J.S. App. 24a.

The district court "agree[d]" with appellants that "*Citizens United* undermines any theory of limiting

contributions to political parties that might have rested on the idea that large contributions to parties create gratitude from, facilitate access to, or generate influence over federal officeholders and candidates." J.S. App. 13a. The court explained that, "[t]o the extent the FEC argues that large contributions to the national parties are corrupting and can be limited because they create gratitude, facilitate access, or generate influence, *Citizens United* makes clear that those theories are not viable." *Id.* at 14a.

The district court further determined that, to the extent this Court's facial analysis in *McConnell* rested "on evidence that national party committees had sold preferential access to federal officeholders and candidates in exchange for large soft-money donations," there was "considerable logic and force" to appellants' argument that *McConnell*'s facial analysis "does not control this as-applied challenge" because the RNC had made a pledge not to undertake such practices. J.S. App. 14a, 15a. "As a result," the court explained, "a large soft-money contributor could obtain no better access to Republican officeholders or candidates—at least not RNC-arranged access—than a maxed-out hard-money contributor to the RNC." *Id.* at 8a. The court found "no reason that the RNC's pledge could not be meaningfully enforced by the FEC." *Id.* at 8a n.4.

The district court nevertheless concluded that it was bound by *McConnell* to reject appellants' as-applied challenge because "the *McConnell* Court, in upholding § 323(a), appeared to rely not only on the selling of access in exchange for soft-money contributions, . . . but also on 'the close relationship between federal officeholders and the national parties.'" J.S. App. 16a. While "acknowledg[ing] that the *McConnell* opinion is ambiguous on the question whether

the 'unity of interest' between national parties and their candidates and officeholders was an independently sufficient rationale for the Court to uphold the blanket ban on soft-money contributions," it stated that, "[a]s a lower court," it did "not believe [it] possess[ed] authority to clarify or refine *McConnell*." *Id.* at 18a.

In ruling in the FEC's favor, the district court acknowledged that the "current mix of statutes, regulations, and court decisions has left a campaign finance system that reduces the power of political parties as compared to outside groups." J.S. App. 18a n.5. The court "recognize[ed] the RNC's concern about this disparity," but concluded that it was ultimately "an argument for the Supreme Court" to address. *Id.*

THE QUESTION IS SUBSTANTIAL

This Court recently reaffirmed that the "First Amendment 'has its fullest and most urgent application to speech uttered during a campaign for political office.'" *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989)). It is therefore the government's burden to "prove" that "*each application* of a statute restricting" political speech survives constitutional scrutiny. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464, 478 (2007) (op. of Roberts, C.J.) (emphasis in original). The government cannot meet that burden in this case as to *any* of the applications of FECA §§ 323(a) and (b) challenged by appellants.

This Court's decision to uphold FECA § 323 on its face in *McConnell v. FEC*, 540 U.S. 93 (2003), was premised on the ground that "candidates would feel grateful for . . . donations [of nonfederal money] and

that donors would seek to exploit that gratitude." *Id.* at 145. In light of *Citizens United*, however, that rationale for restricting the speech and associational rights of political parties and their members is no longer tenable. In *Citizens United*, the Court made clear that the only constitutionally adequate basis for prohibiting political speech is the prevention of actual or apparent *quid pro quo* corruption—arrangements that exchange dollars for political favors—and that "[i]ngratiation and access . . . are *not* corruption." 130 S. Ct. at 910 (emphasis added). "Reliance on a 'generic favoritism or influence theory,'" the Court concluded, is a constitutionally insufficient ground for suppressing First Amendment freedoms. *Id.*

Thus, even if contributions of nonfederal money to political parties engender the gratitude of elected officials and facilitate access to those officials, Congress cannot respond to these inherent features of "'representative politics'" by prohibiting the solicitation and expenditure of nonfederal money. *Citizens United*, 130 S. Ct. at 910. Moreover, the fact that, in the past, political parties may have "promised and provided special access to candidates . . . in exchange for large soft-money contributions" does not transform the provision of "access" into illicit *quid pro quo* corruption. *McConnell*, 540 U.S. at 130. Exchanging donations for political access cannot be equated with the exchange of "dollars for political favors"—which is the essential "hallmark" of all constitutionally cognizable corruption. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). In any event, as the district court found, the RNC has "submitted evidence it will not 'aid' soft-money donors 'in obtaining preferential access to federal candidates or officeholders'"—a commitment that the

court found could "be meaningfully enforced by the FEC." J.S. App. 8a & n.4.

Nor, despite the district court's erroneous holding to the contrary, can the government satisfy its burden of proving *quid pro quo* corruption by relying on a purported "'unity of interest' between national parties and their candidates and officeholders." J.S. App. 18a. By the time *McConnell* was decided, this Court had already repeatedly rejected "the notion of a 'metaphysical identity' between party and candidate." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 447-48 (2001); *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 623 (1996) (op. of Breyer, J.). *McConnell* gave no indication that it was overruling those prior decisions.

After *Citizens United*, then, the government must demonstrate that each application of BCRA's prohibition on nonfederal money targets an activity that, if funded by nonfederal money, would create an appreciable risk of actual or apparent *quid pro quo* corruption of federal officeholders. The government cannot meet that burden in this case as to any of the challenged applications of FECA §§ 323(a) and (b).

Appellants seek to solicit and expend donations for purposes other than "influencing an[ ] election for Federal office" (2 U.S.C. § 431(8)(A)(i)), including supporting state candidates in elections in which no federal candidate appears on the ballot, funding grassroots lobbying campaigns, and financing redistricting efforts. As the *McConnell* district court found, Congress presented *no* evidence at the time of BCRA's enactment that such activities—or any other activities funded by nonfederal money—create a risk of actual or apparent *quid pro quo* corruption. *See*

McConnell v. FEC, 251 F. Supp. 2d 176, 481 (D.D.C. 2003) (Kollar-Kotelly, J.); *id.* at 852 (Leon, J.). Nor has the government proffered any evidence in this case that even remotely suggests that the solicitation and expenditure of nonfederal money to fund this constitutionally protected political speech could serve as the basis for illicit *quid pro quo* arrangements.

If the decision below is permitted to stand, BCRA's prohibition on nonfederal money will continue to stifle the fundamental First Amendment freedoms of appellants and party members, and political parties will continue to confront burdens on their rights of political speech and association that are not imposed on other political organizations, including nonprofit advocacy groups and 527 organizations. Plenary review is warranted to remove these obstacles to the exercise of political parties' First Amendment rights and to safeguard parties' essential role in the American political process.

I. FECA § 323 Is Unconstitutional As Applied To Each Of Appellants' Planned Political Activities.

The government bears the burden of proving that each application of FECA § 323 is "closely drawn" to serve a "sufficiently important" government interest. *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (internal quotation marks omitted); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464, 478 (2007) (op. of Roberts, C.J.). The government cannot meet that burden in this case as to any of the challenged applications of FECA §§ 323(a) and (b).[2]

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[2] FECA § 323 is unconstitutional as applied to appellants whether it is examined under the "closely drawn" standard of scrutiny or under strict scrutiny because it does not further an

A. BCRA's Ban On Nonfederal Money Is Unconstitutional As Applied To Political Activities That Do Not Create A Risk Of *Quid Pro Quo* Corruption.

In *McConnell*, this Court rejected a facial challenge to FECA § 323. Emphasizing that "Congress' legitimate [anticorruption] interest extends beyond preventing simple cash-for-votes corruption," the Court held that FECA § 323 was facially constitutional because nonfederal money could be used to secure the gratitude of, and gain access to, federal officeholders. 540 U.S. at 150. According to the Court, "large soft-money contributions to national parties are likely to create actual or apparent indebtedness

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[Footnote continued from previous page]

important—let alone, a compelling—government interest. FECA § 323 should be examined under strict scrutiny, however, because *all* "[l]aws that burden political speech are subject to strict scrutiny." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (internal quotation marks omitted). Moreover, even if contribution limits are generally subject to a lower standard of scrutiny, FECA § 323 operates as both a contribution limit *and* an expenditure limit. *See* 2 U.S.C. § 444i(a)(1) ("A national committee of a political party ... may not ... spend any funds[ ] that are not subject to the limitations, prohibitions, and reporting requirements of this Act."); *cf. Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam). Finally, even if FECA § 323 were only a contribution limit or were applicable to some activities that implicate only associational (rather than speech) interests, strict scrutiny would still be warranted in light of the "heav[y] burden" that the provision imposes on "political part[ies]' associational freedom." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("Regulations imposing severe burdens on plaintiffs' [associational] rights must be narrowly tailored and advance a compelling state interest.").

on the part of federal officeholders, regardless of how those funds are ultimately used," and "are likely to buy donors preferential access to federal officeholders no matter the ends to which their contributions are eventually put." *Id.* at 155, 156.

To prevent this form of "corruption," the Court continued, it was permissible for Congress to take what the Court described as the "modest" step of enacting a blanket prohibition on national parties' solicitation and expenditure of nonfederal money. *McConnell*, 540 U.S. at 142. The Court also held that the limitations that BCRA imposes on state and local parties' use of nonfederal money were facially constitutional because "state committees function as an alternative avenue for precisely the same corrupting forces" that affect national parties. *Id.* at 164.

As the district court correctly recognized, these "ingratiation" and "access" theories of corruption are no longer constitutionally tenable. J.S. App. 14a. In *Citizens United*, the Court made clear that the government's interest in preventing actual and apparent corruption does not extend beyond illicit *quid pro quo* arrangements. 130 S. Ct. at 910. "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption," the Court explained, "that interest was limited to *quid pro quo* corruption." *Id.* at 909 (citing *Buckley v. Valeo*, 424 U.S. 1, 26-28, 30, 46-48 (1976) (per curiam)). Because the "'hallmark of corruption is the financial *quid pro quo*,'" "[i]ngratiation and access . . . are not corruption." *Id.* at 910 (quoting *FEC v. Nat'l Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480, 497 (1985)). Thus, the "fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." *Id.* Indeed, the Court emphasized that

"'[f]avoritism and influence are not . . . avoidable in representative politics'" and that the "appearance of influence or access" therefore "will not cause the electorate to lose faith in our democracy." *Id.* (ellipsis in original).

Citizens United removes any doubt that "[r]eliance on a generic favoritism or influence theory" to defend restrictions on political speech "is at odds with standard First Amendment analyses." 130 S. Ct. at 910 (internal quotation marks omitted). The government therefore cannot meet its burden of proving the constitutionality of FECA § 323's application to appellants by contending that appellants' First Amendment freedoms must be suppressed to prevent donor "[i]ngratiation and access." *Id.*

To prevail in this as-applied challenge, the government must instead prove that each disputed application of FECA § 323 furthers the government's interest in preventing actual or apparent *quid pro quo* corruption. To satisfy that burden, the government cannot rely on the fact that political parties may in the past have "sold access to federal candidates and officeholders" in exchange for donations of nonfederal money. *McConnell*, 540 U.S. at 153-54 (emphasis omitted). This Court has defined a *quid pro quo* arrangement as one exchanging "dollars for *political favors*." *NCPAC*, 470 U.S. at 497 (emphasis added). Selling "access"—in the form of private meetings, telephone calls, and social invitations—in exchange for donations is a far cry from illicit *quid pro quo* deals in which an officeholder agrees to take favorable governmental action—supporting legislation or directing sought-after agency action, for example—in exchange for a donation. Indeed, the "record before Congress" at the time it enacted FECA "was replete with specific examples of improper at-

tempts to obtain governmental favor in return for large campaign contributions." *Buckley v. Valeo*, 519 F.2d 821, 839 n.37 (D.C. Cir. 1975) (en banc). It was those examples on which the Court relied in *Buckley* to illustrate the "pernicious practice[ ]" of "large contributions . . . given to secure a political *quid pro quo* from current and potential office holders." 424 U.S. at 26, 27.

In any event, the RNC has made a commitment that "it will not arrange or facilitate meetings, conference calls, or other kinds of contact between soft-money contributors and federal candidates and officeholders 'in any manner different than or beyond that currently afforded to contributors' of hard money." J.S. App. 8a. The district court found "no reason that the RNC's pledge could not be meaningfully enforced by the FEC," including by "initiat[ing] an investigation and requir[ing] the RNC to disclose the names of invitees to its donor maintenance events" and "adopt[ing] regulations requiring such disclosures even outside the context of an investigation." *Id.* at 8a n.4.

Nor can the government simply rely—as the district court erroneously did—on "'the close relationship between federal officeholders and the national parties'" to establish a constitutionally sufficient basis for upholding future applications of FECA § 323. J.S. App. 16a. Although this Court has held that large contributions to candidates themselves may create a risk of actual or apparent *quid pro quo* corruption (*Buckley*, 424 U.S. at 26), contributions to political parties are not the equivalent of direct candidate contributions.

This Court has repeatedly held that there is no "'metaphysical identity' between party and candi-

date." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 447-48 (2001) ("*Colorado II*"); *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 622 (1996) (op. of Breyer, J.) ("*Colorado I*"). In *Colorado I*, for example, the Court rejected the FEC's argument that all expenditures by political parties in support of a candidate can be deemed "coordinated"—rather than "independent"—expenditures. 518 U.S. at 621. While "the Government . . . argue[d] that [such] expenditure[s] [are] 'coordinated' because a party and its candidates are identical, *i.e.*, the party, in a sense, 'is' its candidates," the Court refused to "assume . . . that this is so" because parties are "'coalitions' of differing interests" and because "Congress chose to treat candidates and their parties quite differently under" FECA. *Id.* at 622, 623; *see also id.* at 629 (Kennedy, J., concurring) (a "political party has its own traditions and principles that transcend the interests of individual candidates and campaigns"). The Court reaffirmed this conclusion in *Colorado II*, which held that the "assertion that the party is so joined at the hip to candidates that most of its spending must necessarily be coordinated spending is a statement at odds with the history of nearly 30 years under the Act." 533 U.S. at 449.

Nothing in *McConnell* purported to overrule these decisions or otherwise disturb the Court's prior holdings that political parties and their candidates are not so closely aligned as to be considered a single, unitary entity under the law.

B. None Of The Challenged Applications Of FECA § 323 Would Prevent Actual Or Apparent *Quid Pro Quo* Corruption.

Because the government cannot rely on "ingratiation" and "access" or the purported "unity of interest" between candidates and parties to defend BCRA's prohibition on nonfederal money, the government must demonstrate that each challenged application of FECA § 323 prevents actual or apparent *quid pro quo* corruption of federal officeholders. The government cannot meet that burden as to any of appellants' intended uses of nonfederal money.

In *McConnell*, this Court did not purport to identify a single example of *quid pro quo* corruption associated with nonfederal money. Nor could it plausibly have done so in light of the district court's unambiguous factual finding to the contrary. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 851 (D.D.C. 2003) (Leon, J.) ("The record contains no evidence of quid pro quo corruption") (capitalization altered). Indeed, the district court found that "[t]here is no evidence presented in the record that any Member of Congress has *ever* changed his or her vote on any legislation in exchange for a donation of nonfederal funds to his or her political party." *Id.* (emphasis added); *see also id.* at 481 (Kollar-Kotelly, J.).[3]

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[3] The Court in *McConnell* stated that the "evidence connects soft money to manipulations of the legislative calendar." 540 U.S. at 150 (citing 251 F. Supp. 2d at 482 (Kollar-Kotelly, J.); *id.* at 852 (Leon, J.)). The pages of the district court's opinion cited to substantiate these calendar "manipulations" recount testimony regarding what amounts, at most, to legislators' responsiveness to a donor's legislative priorities, not to a *quid pro quo* arrangement in which donations of nonfederal money were

The government has not filled that evidentiary void here by introducing any evidence that the political activities that appellants are seeking to fund with nonfederal money could conceivably generate actual or apparent *quid pro quo* corruption.

Appellants seek to solicit and expend nonfederal money to (1) support candidates in state elections where there are no federal candidates on the ballot (such as the 2009 state elections in New Jersey and Virginia), (2) support state candidates in elections where both federal and state candidates appear on the ballot, (3) finance party redistricting efforts after the 2010 census, (4) fund "grassroots lobbying" efforts to mobilize voters in response to legislative issues, (5) fund litigation in cases not involving federal elections, (6) pay for the maintenance and upkeep of the RNC's national headquarters, (7) finance advertising campaigns regarding California ballot initiatives using advertisements that mention federal candidates, and (8) fund get-out-the-vote efforts and other generic campaign activity.

The government has not identified any evidence that the solicitation of nonfederal money to finance these political activities would create a risk of actual or apparent *quid pro quo* corruption. The government's difficulty in building an evidentiary record is not surprising. It is far-fetched, to say the least, to think that a federal officeholder would sell his vote in exchange for donations to his party that are used

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exchanged for favorable legislative outcomes. *See* 251 F. Supp. 2d at 482 (Kollar-Kotelly, J.) (recounting an episode where, in the absence of a hearing, the Senate amended a bill supported by a donor of nonfederal money); *id.* at 852 (Leon, J.) (same).

to support a state candidate in an election where federal candidates do not even appear on the ballot, to fund a generic get-out-the-vote drive, or to maintain the parties' headquarters. *See Colorado I*, 518 U.S. at 616 (op. of Breyer, J.) ("the opportunity for corruption posed by ['soft money' contributions] is, at best, attenuated").

A federal candidate is much more likely to be corrupted, it would seem, by a multimillion-dollar independent advertising campaign that expressly endorses his candidacy. But, *Citizens United* makes clear that independent expenditures—no matter their size—do not create a risk of *quid pro quo* corruption. It follows, *a fortiori*, that parties' solicitation and expenditure of donations of nonfederal money do not have sufficient *quid pro quo* potential to warrant stifling the speech and associational rights of parties and their members. *See Colorado I*, 518 U.S. at 617 (op. of Breyer, J.) ("an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem *less likely* to corrupt than the same (or a much larger) independent expenditure made directly by that donor") (emphasis added).

Moreover, even if the solicitation and expenditure of nonfederal money could create a risk of *quid pro quo* corruption, FECA §§ 323(a) and (b) would not be "closely drawn" to serve the government's anticorruption interest because there are substantially less restrictive regulatory alternatives available to the government. For example, a monetary limit on the amount of nonfederal money that a donor could give to a party would further the government's anticorruption interest (assuming that interest were implicated by nonfederal money), and, in so doing, would impose a less severe First Amendment burden

than the outright prohibition on nonfederal money established by FECA §§ 323(a) and (b). Like other campaign-finance regulations invalidated by this Court, BCRA's blanket prohibition on nonfederal money is manifestly "disproportionate to the public purposes" it was purportedly "enacted to advance." *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (op. of Breyer, J.).

In the absence of any evidence that the challenged applications of FECA §§ 323(a) and (b) are "closely drawn" to further the government's interest in preventing *quid pro quo* corruption of federal officeholders, those applications of the statute unconstitutionally deprive appellants of their rights to political speech and association.[4]

II. Plenary Review Is Warranted Because The Question Presented Has Profound Implications For The First Amendment Rights Of Political Parties And Their Members.

BCRA's prohibition on nonfederal money imposes onerous restrictions on the First Amendment rights of political parties and their members, and places political parties at a profound disadvantage to other participants in the political process.

This Court has repeatedly emphasized the important role of political parties in the American democratic process. "Representative democracy in any

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[4] Although this case was filed as an as-applied challenge, this Court's post-filing decision in *Citizens United*—together with the absence of any evidence in BCRA's legislative history or the record in this case linking donations of nonfederal money to *quid pro quo* corruption—indicates that FECA §§ 323(a) and (b) may well be unconstitutional in *all* their applications.

populous unit of governance is unimaginable," the Court has explained, "without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). It is no surprise, then, that the "formation of national political parties was almost concurrent with the formation of the Republic itself." *Id.*

FECA § 323 is incompatible with the Nation's political history and constitutional tradition because it severely restricts the ability of political parties to finance political activities. Indeed, BCRA's blanket prohibition on nonfederal money does not preserve a *single* political activity that a national party can finance with nonfederal money. No matter how attenuated the link to federal elections, a national party cannot speak unless its speech is financed by funds raised in compliance with FECA's source and amount limitations. Even if those limitations may be a reasonable response to the potential for *quid pro quo* corruption of federal officeholders where the money is to be spent "for the purpose of influencing" a federal election (2 U.S.C. § 431(8)(A)(i)), those requirements are unwarranted and unconstitutional where a national party is spending funds for other purposes, such as state campaigns, litigation, or redistricting.

The First Amendment burdens of BCRA's prohibition on nonfederal money reach not only the parties themselves but also their members. As this Court has emphasized, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents" to associate together. *NAACP v. Button*, 371 U.S. 415, 431 (1963) (internal quotation marks omitted); *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S.

290, 296 (1981) ("To place a . . . limit . . . on individuals wishing to band together to advance their views . . . is clearly a restraint on the right of association."). Indeed, exercising their associational right to join together in a political party is generally the most effective means for individuals to make their voices heard in the political process. BCRA's prohibition on nonfederal funds impairs that associational right by constraining the ability of political parties to speak on their members' behalf.

In so doing, BCRA places political parties at a disadvantage to those political organizations, such as nonprofit advocacy groups and 527 organizations, that have the ability to fund political activities without regard to the source and amount restrictions that impede political parties' nonfederal activities. *See Citizens United*, 130 S. Ct. at 913 (advocacy groups and other corporations); *EMILY's List v. FEC*, 581 F.3d 1, 25 (D.C. Cir. 2009) (527s). Singling out political parties for disfavored First Amendment status is fundamentally at odds with parties' overriding importance to the electoral process, and with the speech and associational rights of their members. *See Citizens United*, 130 S. Ct. at 898 (the First Amendment . . . [p]rohibit[s] . . . restrictions distinguishing among different speakers, allowing speech by some but not others").

Unless the government can make a showing that parties' use of nonfederal money to fund political activities creates a meaningful risk of actual or apparent *quid pro quo* corruption, parties cannot be relegated to second-class constitutional status. Because the government has not made that showing here, FECA §§ 323(a) and (b) are unconstitutional in each of their challenged applications.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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April 23, 2010

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Republican National Committee, California Republican Party, Republican Party of San Diego County, and Michael Steele,	)	
Plaintiffs,	)	Civil No. 08-1953 (BMK)(RJL)(RMC)
v.	)	
	)	Three-Judge Court
Federal Election Commission,	)	
Defendant,	)	
Democratic National Committee and Representative Christopher Van Hollen, Jr.,	)	
Intervenors.	)	

Before: KAVANAUGH, Circuit Judge; LEON, District Judge; and COLLYER, District Judge.

MEMORANDUM OPINION

KAVANAUGH, Circuit Judge:

The Supreme Court's First Amendment jurisprudence establishes several principles regarding the regulation of campaign finance. First, Congress may impose some limits on contributions to federal candidates and political parties because of the *quid pro quo* corruption or appearance of *quid pro quo* corruption that can be associated with such contributions. Second, Congress may not limit expenditures by candidates and political parties. And third, Congress may not limit non-connected entities—including individuals, unincorporated associations, non-profit organizations, labor unions, and for-profit corporations—from spending or raising money to support the election or defeat of candidates. *See Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Davis v. FEC*, 128 S. Ct. 2759 (2008); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); *McConnell v. FEC*, 540 U.S. 93 (2003); *Buckley v. Valeo*, 424 U.S. 1 (1976); *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).[1]

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[1] Because of the potential relationship of the questions presented in the Supreme Court's *Citizens United* reargument order to some of the questions at issue here, we awaited the Supreme Court's decision before deciding this case. Immediately after the Supreme Court issued its *Citizens United* decision, we ordered and promptly received helpful supplemental briefing on the impact of *Citizens United*.

This case involves regulation in the first category—in this instance, statutory limits on contributions to political parties.

The Bipartisan Campaign Reform Act of 2002, known as BCRA, limits contributions to national, state, and local political parties. With respect to national political parties, BCRA's limits apply regardless of how a national party might want to use the money—for example, even if the party wishes to use the money to fund issue ads or state and local election activities. BCRA's limits on contributions to political parties are known as the soft-money bans. In 2003, the Supreme Court upheld those provisions against a facial First Amendment challenge. *See McConnell*, 540 U.S. 93.

Here, the Republican National Committee, the California Republican Party, the Republican Party of San Diego County, and the RNC Chairman bring a number of as-applied challenges to BCRA's restrictions on political-party fundraising. We conclude that plaintiffs' claims conflict with the Supreme Court's decision in *McConnell*. The Supreme Court's recent decision in *Citizens United* did not disturb *McConnell*'s holding with respect to the constitutionality of BCRA's limits on contributions to political parties. *See* 130 S. Ct. at 910-11 ("The BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money.") (citations omitted). As a lower court, we do not possess the authority to clarify or refine *McConnell* in the manner suggested by plaintiffs. We therefore GRANT the Federal Election Commission's motion for summary judgment, DENY plaintiffs' motion for summary judgment, and

DISMISS AS MOOT the Federal Election Commission's motion to dismiss.

LEGAL BACKGROUND

We begin by briefly summarizing the challenged provisions of BCRA, the Bipartisan Campaign Reform Act of2002, Pub. L. No. 107-155, 116 Stat. 81.

Congress has long imposed source and amount limits on contributions to federal candidates. Congress also has long limited contributions to political parties to the extent the contributions are made for the purpose of influencing federal elections. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, sec. 112(2), § 320(a)(1), 90 Stat. 475, 487 (codified as amended at 2 U.S.C. § 441a(a)(1)); *see also Buckley v. Valeo*, 424 U.S. 1, 13 n.12 (1976) (citing pre-1976 statutory provisions limiting contributions to candidates); *id.* at 38 (upholding limit on annual contributions to candidates, political committees, and political parties).

Before enactment of BCRA in 2002, federal law permitted national political parties to accept and use large, unlimited contributions—referred to as "soft-money" contributions—to help fund issue ads, purely state and local election activities, and mixed-purpose activities (for example, get-out-the-vote and voter registration in years when federal, state, and local candidates are all on the ballot). Some of those activities by the national parties could simultaneously influence federal elections even though they did not expressly advocate the election or defeat of a federal candidate. *See McConnell v. FEC*, 540 U.S. 93, 122-24 (2003).

Congress enacted BCRA in part to plug this "soft-money loophole" that had "enabled parties and

candidates to circumvent . . . limitations on the source and amount of contributions [made] in connection with federal elections." *Id.* at 126, 133. Among other changes, BCRA added § 323(a) and (b) to the Federal Election Campaign Act of 1971.

Section 323(a) applies to national political parties, as well as to officers or agents acting on their behalf. Under § 323(a), national parties may not solicit, receive, direct, or spend contributions over $30,400 annually from an individual donor, regardless of whether the national party might want to spend some of its money on non-federal-election activity such as issue ads or state and local activities. 2 U.S.C. § 441i(a); *see id.* § 441a(a)(1)(B); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435, 7437 (Feb. 17, 2009).

In part to prevent circumvention of the limits on contributions to national parties, § 323(b) limits contributions to state and local political parties. The goal was to prevent unlimited donations to state and local party committees that those committees would then use to support the election or defeat of a federal candidate. Under § 323(b), with certain exceptions not at issue here, state, district, and local parties may not use any contributions over $10,000 received from an individual donor in a calendar year for any "Federal election activity." 2 U.S.C. § 441i(b); *see id.* § 441a(a)(1)(C). As relevant here, federal election activity under § 323(b) includes (1) any "voter registration activity" that occurs in the 120 days before a federal election; (2) any "voter identification, get-out-the-vote activity, or generic campaign activity" that is conducted "in connection with" an election in which a federal candidate appears on the ballot; and (3) any "public communication" that

promotes, supports, attacks, or opposes a clearly identified federal candidate. *Id.* § 431(20)(A)(i)-(iii). "Generic campaign activity" means activity that promotes a political party without promoting any specific candidate. *Id.* § 431(21). The provision applies to state and local political parties, as well as to officers or agents acting on their behalf.

Shortly after BCRA took effect in March 2002, a number of groups and individuals, including some of the parties here (the Republican National Committee and the California Republican Party), filed suit challenging the constitutionality of § 323 and other provisions of BCRA. The Supreme Court upheld § 323 in its entirety against a facial First Amendment challenge. *See McConnell*, 540 U.S. at 133-85.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs in this suit are the Republican National Committee, a national party committee subject to § 323(a); the California Republican Party, a state party committee subject to § 323(b); the Republican Party of San Diego County, a local party committee subject to § 323(b); and Michael Steele, the Chairman of the RNC, who is subject in his official capacity to the solicitation restrictions of § 323(a). *See* Amended Compl. for Declaratory and Injunctive Relief ¶¶ 11-14.[2] The defendant is the Federal Election Commission. Intervenors in

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[2] When this action was originally filed, then-Chairman Robert M. Duncan was a named plaintiff. Plaintiffs later amended their complaint to replace Duncan with Michael Steele, who succeeded Duncan as Chairman of the RNC. Steele's claims are identical to those previously raised by Duncan.

support of the defendant are the Democratic National Committee and Representative Christopher Van Hollen, the Chairman of the Democratic Congressional Campaign Committee.

The RNC produced evidence that it seeks to raise and spend unlimited soft money in order to (1) support state candidates in elections where only state candidates appear on the ballot; (2) support state candidates in elections where both state and federal candidates appear on the ballot; (3) support state parties' redistricting efforts following the 2010 census; (4) support "grassroots lobbying efforts" aimed at educating and mobilizing voters around "legislation and issues"; (5) pay the fees and expenses attributable to this case and "other litigation not involving federal elections"; and (6) pay maintenance and upkeep expenses associated with the RNC's headquarters. *See* Mem. in Supp. of Pls.' Mot. for Summ. J. at 4-5.[3] In the RNC's view, the First Amendment entitles it to raise and spend soft money for those activities because they lack sufficient connection to a *federal* election. *See* Amended Compl. for Declaratory and Injunctive Relief ¶¶ 29-45.

In upholding the soft-money ban, *McConnell* relied in part on evidence showing that federal candidates and officeholders had solicited donations to their national party committees and that the national parties had sold access to federal

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[3] This list of proposed activities, which is drawn from Plaintiffs' Motion for Summary Judgment, differs slightly from the list found in Plaintiffs' Amended Complaint. *See* Amended Compl. for Declaratory and Injunctive Relief ¶¶ 16-21. None of those differences is material to the resolution of this case.

officeholders and candidates in exchange for large contributions. In support of its as-applied challenges to BCRA § 323(a) and to surmount *McConnell*, the RNC produced evidence in the form of affidavits that it will no longer "use any federal candidates or officeholders to solicit" soft-money contributions. Mem. in Supp. of Pls.' Mot. for Summ. J. at 6. The RNC also submitted evidence it will not "aid" soft-money donors "in obtaining preferential access to federal candidates or officeholders." *Id.* at 5. Specifically, the RNC produced evidence that it will not arrange or facilitate meetings, conference calls, or other kinds of contact between soft-money contributors and federal candidates and officeholders "in any manner different than or beyond that currently afforded to contributors" of hard money. *Id.* at 5-6; *see also* Pls.' Statement of Undisputed Material Facts ¶¶ 24, 30; Aff. of Richard Clinton Beeson ¶ 19; Aff. of Robert M. "Mike" Duncan ¶ 6; Aff. of Michael Steele ¶ 6. As a result, a large soft-money contributor could obtain no better access to Republican officeholders or candidates—at least not RNC-arranged access—than a maxed-out hard-money contributor to the RNC (currently, one who gives $30,400 in a calendar year).[4]

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[4] The FEC raised questions about how the RNC's pledge would be enforced. The RNC responded to this enforceability issue by asserting "that if it were to provide a [soft-money] donor with preferential access to a federal candidate or officeholder . . . then any contribution from such a donor would be illegal and in violation of FECA." Pls.' Reply Mem. in Supp. of Summ. J. at 20 n.24. At oral argument, counsel for the RNC reiterated that assertion. *See* Tr. of Oral Arg. at 48-49 (if RNC violates its no-preferential-access pledge, "then there is an illegal Federal contribution"). Counsel added that if the FEC

For their part, the California Republican Party and the Republican Party of San Diego County produced evidence that they seek to raise and spend unlimited soft money to (1) produce and distribute public communications that advocate the passage or defeat of California ballot initiatives and incidentally criticize federal candidates; and (2) engage in voter registration, voter identification, get-out-the-vote activities, and "generic campaign activity" as defined in 2 U.S.C. § 431(21) in connection with elections where both state and federal candidates appear on the ballot, but not "targeted to" any federal race or candidate. *See* Amended Compl. for Declaratory and Injunctive Relief ¶¶ 23-25, 49-54.

Finally, Steele averred that he seeks to solicit soft-money contributions to the RNC's accounts, as well as soft-money contributions to state parties and state candidates, in his official capacity as RNC Chairman. *See id.* ¶¶ 22, 29-48.

Plaintiffs and the FEC filed cross-motions for summary judgment. Intervenors Representative Christopher Van Hollen and the Democratic National Committee filed briefs in opposition to plaintiffs' summary judgment motion. In considering a summary judgment motion, we "view the evidence

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[Footnote continued from previous page]

suspected the RNC was not honoring its pledge, the FEC could initiate an investigation and require the RNC to disclose the names of invitees to its donor maintenance events. *Id.* at 49-50. Counsel also acknowledged, in response to a question from the court, that the FEC presumably could adopt regulations requiring such disclosures even outside the context of an investigation. *Id.* at 50. We find no reason that the RNC's pledge could not be meaningfully enforced by the FEC.

in the light most favorable to the nonmoving party, draw all reasonable inferences in [its] favor, and eschew making credibility determinations or weighing the evidence." *Montgomery v. Chao*, 546 F.3d 703, 706 (D.C. Cir. 2008). We will grant a summary judgment motion if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED R. CIV. P. 56(c).

DISCUSSION

I. Standard of Scrutiny

The initial issue concerns the proper standard of scrutiny. Under the Supreme Court's precedents, limits on campaign *expenditures* are subject to strict scrutiny. But limits on *contributions* to candidates and political parties are subject to "less rigorous scrutiny" and are valid if they are "closely drawn" to meet a "sufficiently important" governmental interest. *McConnell v. FEC*, 540 U.S. 93, 134-38 & n.40 (2003) (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003)); *see Buckley v. Valeo*, 424 U.S. 1, 25, 44-45 (1976). To be sure, every limit on contributions logically reduces the total amount that the recipient of the contributions otherwise could spend. But the Court has stated that this truism does not mean limits on contributions are simultaneously considered limits on expenditures that therefore receive strict scrutiny. *See Buckley*, 424 U.S. at 20-21; *see also Randall v. Sorrell*, 548 U.S. 230, 241-42, 246-47 (2006) (controlling opinion of Breyer, J.).

The *McConnell* Court ruled that all of the provisions of § 323 were contribution limits, and the Court thus applied "closely drawn" scrutiny rather than strict scrutiny. *McConnell*, 540 U.S. at 138-41. Plaintiffs in this case argue that we nonetheless

must employ strict scrutiny. Plaintiffs contend that § 323's contribution limits will function as expenditure limits when applied to their proposed conduct. But that argument flies in the face of *McConnell*, which squarely held that the level of scrutiny for regulations of contributions to candidates and parties does not turn on how the candidate or party chooses to spend the money or to structure its finances. Moreover, *Citizens United* expressly left intact this portion of *McConnell*. *See Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) ("Citizens United ... has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.").

II. The Merits

A. The Claims of the RNC

The RNC raises a variety of alternative arguments against the soft-money ban.

First, the RNC asserts that § 323(a) cannot constitutionally be applied to activities that are not "unambiguously related to the campaign of a particular federal candidate." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). Plaintiffs' proposed "unambiguously campaign related" standard is another way of describing the express advocacy test that courts used pre-*McConnell* for determining, among other things, which activities a party had to fund with hard money and which it could fund with its unlimited soft-money donations. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 123-24 (2003) (before BCRA, political parties could "use soft money to defray the costs of 'legislative advocacy media advertisements,' even if the ads mentioned the name of a federal candidate, so long as they did not

expressly advocate the candidate's election or defeat"); *id.* at 283 (opinion of Thomas, J.) ("speech that is 'unambiguously campaign related,' *i.e.*, speech using words of express advocacy") (citation omitted). In other words, plaintiffs want the Court to permit large soft-money contributions so long as they are used to fund issue ads or state and local election campaigns. *McConnell* rejected this approach; indeed, this was the whole point of BCRA's soft-money ban and of the *McConnell* decision upholding it. *See, e.g.*, *id.* at 131-32 (BCRA sought to curb the political parties' use of soft-money contributions to fund "issue advertising" and state and local election activities that ultimately influenced federal elections and benefited federal candidates). This particular argument is another way of asking us to overrule *McConnell*'s holding with respect to the ban on soft-money contributions to national political parties. As a lower court, we of course have no authority to do so.

Second, the RNC relatedly argues that § 323(a) violates the First Amendment to the extent it applies to contributions that would be used for *non*-federal-election activities. The Supreme Court considered and rejected this argument in *McConnell*. The Court ruled that § 323(a) is not overbroad simply because it "subjects *all* funds raised and spent by national parties to FECA's hard-money source and amount limits, including, for example, funds spent on purely state and local elections in which no federal office is at stake." *Id.* at 154. The Court held that "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, *regardless of how those funds are ultimately used.*" *Id.* at 155 (emphasis added).

It is true that *McConnell* permits as-applied challenges to the provisions of BCRA. *See Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, 412 (2006). But *McConnell* upheld § 323(a) against a facial challenge based on the same applications of the statute that the RNC now raises in its as-applied challenge. In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent. Therefore, to the extent the RNC is arguing that § 323(a) is unconstitutional because it applies to contributions for non-federal-election activities, that argument fails in light of *McConnell*. Again, *Citizens United* expressly left this aspect of *McConnell* intact. *See Citizens United v. FEC*, 130 S. Ct. 876, 910-11 (2010) ("The BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money.") (citations omitted).

Third, the RNC argues that no viable theory of corruption justifies these limits on contributions to political parties.

The RNC contends that *Citizens United* undermines any theory of limiting contributions to political parties that might have rested on the idea that large contributions to parties create gratitude from, facilitate access to, or generate influence over federal officeholders and candidates. On that threshold point, we agree with the RNC's interpretation of *Citizens United*. *See id.* at 909-10 ("When *Buckley* identified a sufficiently important

governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt. . . . The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.") (citations omitted); *id.* at 910 ("Ingratiation and access, in any event, are not corruption."). To the extent the FEC argues that large contributions to the national parties are corrupting and can be limited because they create gratitude, facilitate access, or generate influence, *Citizens United* makes clear that those theories are not viable.

But that is not enough for the RNC to prevail here because *McConnell*'s decision to uphold the soft-money ban rested on something more specific: record evidence of the *selling* of *preferential access* to federal officeholders and candidates in exchange for soft-money contributions. *See McConnell*, 540 U.S. at 153-54 ("[I]t is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence. . . . It was not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption."); *see also Citizens United*, 130 S. Ct. at 910 ("The BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials.").

The RNC, in turn, responds that *McConnell*'s rationale does not control this as-applied challenge because the RNC has now pledged to end its role as an intermediary for such transactions by (1) not involving federal candidates or officeholders in its

soft-money solicitations; and (2) not granting soft-money donors preferential access to candidates or officeholders based on their large, soft-money contributions. *See* Mem. in Supp. of Pls.' Mot. for Summ. J. at 5-6. The RNC contends that it therefore is entitled to an as-applied exemption from § 323(a) with respect to its use of soft money for non-federal-election activities.

The RNC's as-applied argument—advanced as a way of distinguishing *McConnell*—carries considerable logic and force. After all, the RNC is right that *McConnell*, in upholding the across-the-board ban on national parties' raising and spending soft money for any purpose, relied heavily on evidence that national party committees had sold preferential access to federal officeholders and candidates in exchange for large soft-money donations. *See, e.g.*, *McConnell*, 540 U.S. at 150-52 (describing record evidence of a "pervasive" practice of "national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations"); *id.* at 153-54 ("it is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence"); *id.* at 156 ("Congress had sufficient grounds to regulate the appearance of undue influence associated with" a practice in which "large soft-money donations to national party committees are likely to buy donors preferential access to federal officeholders"); *see also EMILY's List v. FEC*, 581 F.3d 1, 13 & n.12 (D.C. Cir. 2009).

According to the RNC, removing that factual element from the equation would largely eliminate the problem the *McConnell* Court cited in finding § 323(a) constitutional. The RNC argues that if the

soft-money contributions are not used for federal-election activities, if federal officeholders and candidates are not involved in solicitation of the contributions, and if the contributions facilitate no greater RNC-arranged access to federal candidates or officeholders than a maxed-out hard-money contributor receives, there can be no corruption or appearance of corruption from the soft-money contributions.

The problem for the RNC—at least at this District Court level—is that the *McConnell* Court, in upholding § 323(a), appeared to rely not only on the selling of access in exchange for soft-money contributions, which is arguably resolved by the RNC's pledge to no longer grant soft-money contributors preferential access, but also on "the close relationship between federal officeholders and the national parties." 540 U.S. at 154; *see also id.* at 152 (describing "the close ties that candidates and officeholders have with their parties"). The Court observed, for example, that there was "no meaningful separation between the national party committees and the public officials who control them," because the national committees were "run by, and largely composed of, federal officeholders and candidates." *Id.* at 155 (internal quotation omitted). The Court also noted that because the national parties were "inextricably intertwined with federal officeholders and candidates, . . . there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process." *Id.* (internal quotation omitted). The Court stated that "[g]iven this close connection and alignment of interests, large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of

federal officeholders, regardless of how those funds are ultimately used." *Id.*; *see also id.* at 145 ("federal candidates and officeholders enjoy a special relationship and unity of interest" with national political parties, and this "close affiliation has placed national parties in a unique position, whether they like it or not, to serve as agents for spending on behalf of those who seek to produce obligated officeholders") (quoting *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001)) (internal quotation marks omitted). The Court summarized the point as follows: "[I]t is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect." *Id.* at 154-55.

In relying in part on the inherently close relationship between parties and their officeholders and candidates, the Court suggested that federal officeholders and candidates may value contributions to *their national parties*—regardless of how those contributions ultimately may be used—in much the same way they value contributions to *their own campaigns*. As a result, the reasoning goes, contributions to national parties have much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or at least the appearance of *quid pro quo* corruption. *See id.* at 144 ("contributions to a federal candidate's party in aid of that candidate's campaign threaten to create—no less than would a direct contribution to the candidate—a sense of obligation"); *cf. Buckley*, 424 U.S. at 23-29 (upholding FECA's limits on direct contributions to candidates and their campaign committees); *EMILY's List*, 581 F.3d at 14 ("non-

profit groups do not have the same inherent relationship with federal candidates and officeholders that political parties do"). And the *McConnell* Court appears to have upheld § 323(a) at least in part for that reason. *See McConnell*, 540 U.S. at 154-55.

We acknowledge that the *McConnell* opinion is ambiguous on the question whether the "unity of interest" between national parties and their candidates and officeholders was an independently sufficient rationale for the Court to uphold the blanket ban on soft-money contributions to national parties. In due course, the Supreme Court will have the opportunity to clarify or refine this aspect of *McConnell* as the Court sees fit, and to consider the RNC's challenge to § 323(a) in light of the RNC's pledge to no longer grant preferential access to soft-money contributors. As a lower court, however, we do not believe we possess authority to clarify or refine *McConnell* in the fashion advocated by the RNC, or to otherwise get ahead of the Supreme Court. *Cf. Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Therefore, we reject the RNC's challenges to § 323(a) as a matter of law and grant the FEC's motion for summary judgment with respect to those claims.[5]

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[5] The current mix of statutes, regulations, and court decisions has left a campaign finance system that reduces the power of political parties as compared to outside groups. *See Citizens United*, 130 S. Ct. 876; *EMILY's List*, 581 F.3d at 19. Under current law, outside groups—unlike candidates and political parties—may receive unlimited donations both to

B. The Claims of the California Republican Party and the Republican Party of San Diego County

Next, we consider the claims of the state and local party plaintiffs, the California Republican Party and the Republican Party of San Diego County. They target § 323(b), which prohibits them from using soft-money contributions for any "Federal election activity." They contend that § 323(b) is unconstitutional as applied to their proposed activities, which they concede fall within the statutory definition of federal election activity. Specifically, they assert that the First Amendment entitles them to receive and spend soft-money contributions (that is, contributions above the current $10,000 annual limit) on (1) public communications that promote the California Republican Party's position on California ballot initiatives and incidentally criticize or oppose federal candidates; and (2) voter registration, voter identification, get-out-the-vote activities, and "generic campaign activity" in connection with elections where both state and federal candidates

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[Footnote continued from previous page]

advocate in favor of federal candidates and to sponsor issue ads. We recognize the RNC's concern about this disparity, which, it argues, discriminates against the national political parties in political and legislative debates. But that is an argument for the Supreme Court or Congress. As a lower court, it is not our place to reassess the constitutionality of limits on contributions to political parties that the Supreme Court has upheld. And it is not our role to question Congress's policy choice to limit contributions to political parties.

appear on the ballot, but not "targeted to" any federal race or candidate.[6]

In *McConnell*, the Supreme Court squarely rejected those claims. There, the Court upheld § 323(b) against a facial First Amendment challenge. In so doing, the Court considered the argument that § 323(b) was overbroad because it applied to expenditures by state and local parties that allegedly "pose no conceivable risk of corrupting or appearing to corrupt federal officeholders." *McConnell*, 540 U.S. at 166. The Court rejected that argument on the ground that the statute "is narrowly focused on regulating contributions that pose the greatest risk" of corrupting federal candidates by placing them "in the debt of the contributor"—namely, contributions that state and local parties could use "to benefit federal candidates directly." *Id.* at 167. The Court examined each of the categories of activity that § 323(b) requires state and local parties to pay for with hard money, and it found that expenditures in each category had a significant potential to "directly assist" federal candidates. *See id.* at 167-71.

As we explained in the previous section, we of course understand that the Supreme Court's analysis of § 323(b) permits as-applied challenges based on the kind of expenditure at issue. *Cf. Wisconsin Right to Life*, 546 U.S. at 412. But as with § 323(a), the as-applied arguments raised against § 323(b) are

---

[6] Like the RNC, the California Republican Party and the Republican Party of San Diego County argue that the soft-money ban cannot constitutionally be applied to activities that are not "unambiguously related to the campaign of a particular federal candidate." As we explained above, that argument falters under *McConnell*.

essentially the same arguments considered and rejected in *McConnell*. There is nothing substantially new presented in plaintiffs' as-applied challenge to § 323(b).

With respect to advertisements paid for by state and local parties, for example, the *McConnell* Court stated that "'[p]ublic communications' that promote or attack a candidate for federal office . . . undoubtedly have a dramatic effect on federal elections." 540 U.S. at 169. Noting that such ads "were a prime motivating force behind BCRA's passage," the Court concluded that "any public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating." *Id.* at 169-70. Therefore, the Court found § 323(b) closely drawn to the Government's anti-corruption interest. *Id.* at 170.

Plaintiffs do not distinguish their proposed ads from the category of state and local party advertising that the Supreme Court expressly considered in *McConnell*. They allege only that their ads will be "targeted" primarily at state ballot initiatives and that their attacks on federal candidates will be incidental to that purpose. But nothing in *McConnell* suggests that the question whether a state or local party's communication implicates the federal anti-corruption interest depends on whether the communication is "targeted" at federal elections. Indeed, *McConnell* stated that "*any* public communication" by a state or local party that "attacks a clearly identified federal candidate" implicates the federal anti-corruption interest. *Id.* (emphasis added). Under *McConnell*, Congress can require that such party communications be funded with the party's hard money (that is, with

contributions to the party that are subject to source and amount limits). *Id.*

The *McConnell* Court also held that "voter registration efforts and voter identification, GOTV [get-out-the-vote], and generic campaign activities conducted in connection with a federal election clearly capture activity that benefits federal candidates" because "federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls." *Id.* at 167-68 (citations omitted). The Court concluded that because all of those activities "confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption," and therefore Congress could require that such activities be funded with hard money. *Id.* at 168.

Again, plaintiffs have not distinguished their proposed activities from the categories of state and local party activities the Supreme Court considered in *McConnell*. They simply assert that their voter drives and generic campaign activities will not be "targeted" at any federal election. Even taking that assertion as true, it has no legal relevance under *McConnell*. The Supreme Court made clear that whether § 323(b) can be constitutionally applied to a particular state or local party activity depends, not on whether the party's primary "target" is federal, but on whether the activity would provide a direct benefit to federal candidates. Plaintiffs do not deny that their proposed activities would provide such a benefit. Therefore, we reject plaintiffs' as-applied challenges to § 323(b) as a matter of law.

C. The Claims of the RNC Chairman

Finally, we consider the RNC Chairman's as-applied challenges. Under the Supreme Court's precedent, the RNC is not entitled to raise, receive, or spend soft money for *any* purpose. It necessarily follows that the Chairman cannot solicit soft-money contributions to the RNC's accounts. *See id.* at 157-58.

The Chairman also wants to solicit soft-money contributions to *state* parties and candidates, and he contends that § 323(a) is unconstitutional as applied to such solicitations. That claim is also foreclosed by *McConnell*. There, the Supreme Court upheld § 323(a) insofar as it prohibits national party committees, and party officers in their official capacities, from *soliciting or directing* soft-money contributions on behalf of state committees and state and local candidates. *Id.* The Court reasoned that the restriction on solicitation "follows sensibly from the prohibition on national committees' receiving soft money," because a "national committee is likely to respond favorably to a donation made at its request regardless of whether the recipient is the committee itself or another entity." *Id.*

In other words, the Court's rationale for upholding the solicitation restriction was the same as its rationale for holding that *all* soft-money contributions to national parties can be regulated, regardless of how they are used. If Congress can prohibit a national party from *spending soft money from its own accounts* to support state parties and candidates, it follows that Congress can also prohibit the national party from raising soft money *on behalf of* state parties and candidates. Under *McConnell*, there is no reason to think that contributions made

to a national party and contributions made *at the behest* of a national party are any different in terms of their potential ability to produce corruption or the appearance of corruption.

In discussing § 323(a)'s restriction on solicitation, the Court did observe that under the statute, "officers of national parties are free to solicit soft money in their individual capacities." *Id.* at 157. Thus, under *McConnell*, the Chairman may solicit soft-money donations on behalf of state and local parties and candidates, so long as he does so in his individual capacity and does not use RNC resources or his title as Chairman of the RNC to further his fundraising efforts. Plaintiffs' amended complaint, however, specifically asserts that the Chairman "intends to make the described solicitations in his official capacity as RNC Chairman on behalf of RNC." Amended Compl. for Declaratory and Injunctive Relief ¶ 22. Thus, we reject the Chairman's as-applied challenges to § 323(a) as a matter of law.[7]

CONCLUSION

The FEC's motion for summary judgment is GRANTED, plaintiffs' motion for summary judgment is DENIED, and the FEC's motion to dismiss is DISMISSED AS MOOT.

This the 26th day of March, 2010.

---

[7] Because we find that all of plaintiffs' claims are foreclosed on their merits, we need not consider the FEC's argument that some of the claims are also barred by *res judicata*. *See In re Franklin Sav. Corp.*, 385 F.3d 1279, 1286 (10th Cir. 2004) (*res judicata* not a jurisdictional issue).

/s/
BRETT M. KAVANAUGH
United States Circuit Judge

/s/
RICHARD J. LEON
United States District Judge

/s/
ROSEMARY M. COLLYER
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Republican National Committee, California Republican Party, Republican Party of San Diego County, and Michael Steele,	)	
Plaintiffs,	)	Civil No. 08-1953 (BMK)(RJL)(RMC)
v.	)	
	)	Three-Judge Court
Federal Election Commission,	)	
Defendant,	)	
Democratic National Committee and Representative Christopher Van Hollen, Jr.,	)	
Intervenors.	)	

ORDER AND FINAL JUDGMENT

For the reasons set forth in the Memorandum Opinion, it is this 26th day of March, 2010, hereby

ORDERED that Defendant Federal Election Commission's Motion for Summary Judgment [#56] is **GRANTED**; it is further

ORDERED that Plaintiffs' Motion for Summary Judgment [#21] is **DENIED**; it is further

ORDERED that Defendant Federal Election Commission's Motion To Dismiss [#20] is **DISMISSED AS MOOT**; and it is further

ORDERED that final judgment be entered for the defendant.

SO ORDERED.

/s/
BRETT M. KAVANAUGH
United States Circuit Judge

/s/
RICHARD J. LEON
United States District Judge

/s/
ROSEMARY M. COLLYER
United States District Judge

APPENDIX C

United States District Court
District of Columbia

Republican National Committee et al., ***Plaintiffs,*** *v.* **Federal Election Commission** et al., ***Defendants.***	**Case No.** 08-1953 (BMK, RJL, RMC) THREE-JUDGE COURT

Notice of Appeal to U.S. Supreme Court

Notice is given that Plaintiffs Republican National Committee, California Republican Party, Republican Party of San Diego County, and Chairman Michael Steele hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on March 26, 2010 (Doc. 103), and from all decisions, rulings, and orders that gave rise to that final judgment, including, but not limited to, this Court's Order (March 26, 2010; Doc. 102) denying Plaintiffs' Motion for Summary Judgment (Doc. 21) and granting Defendants' Motion for Summary Judgment (Doc. 55). Appeal is taken pursuant to § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002. Pub. L. No. 107-155, 116 Stat. 81, 113-14 (providing for direct appeal to the Supreme Court).

April 2, 2010

Respectfully submitted

/s/

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APPENDIX D

2 U.S.C. § 431 provides in relevant part:

§ 431. Definitions.

* * *

(20) Federal election activity

(A) In general

The term "Federal election activity" means—

(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);

(iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or

(iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that

month on activities in connection with a Federal election.

(B) Excluded activity

The term "Federal election activity" does not include an amount expended or disbursed by a State, district, or local committee of a political party for—

(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);

(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);

(iii) the costs of a State, district, or local political convention; and

(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

(21) Generic campaign activity

The term "generic campaign activity" means a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate.

* * *

2 U.S.C. § 441i provides:

§ 441i. Soft money of political parties

(a) National committees

(1) In general

A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Applicability

The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

(b) State, district, and local committees

(1) In general

Except as provided in paragraph (2), an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Applicability

(A) In general

Notwithstanding clause (i) or (ii) of section 431(20)(A) of this title, and subject to subparagraph (B), paragraph (1) shall not apply to any amount expended or disbursed by a State, district, or local committee of a political party for an activity described in either such clause to the extent the amounts expended or disbursed for such activity are allocated (under regulations prescribed by the Commission) among amounts—

(i) which consist solely of contributions subject to the limitations, prohibitions, and reporting requirements of this Act (other than amounts described in subparagraph (B)(iii)); and

(ii) other amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of this subsection).

(B) Conditions

Subparagraph (A) shall only apply if--

(i) the activity does not refer to a clearly identified candidate for Federal office;

(ii) the amounts expended or disbursed are not for the costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office;

(iii) the amounts expended or disbursed which are described in subparagraph (A)(ii) are paid from amounts which are donated in accordance with State law and which meet the requirements of subparagraph (C), except that no person (including any person established, financed, maintained, or

controlled by such person) may donate more than $10,000 to a State, district, or local committee of a political party in a calendar year for such expenditures or disbursements; and

(iv) the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement, and do not include any funds provided to such committee from—

(I) any other State, local, or district committee of any State party,

(II) the national committee of a political party (including a national congressional campaign committee of a political party),

(III) any officer or agent acting on behalf of any committee described in subclause (I) or (II), or

(IV) any entity directly or indirectly established, financed, maintained, or controlled by any committee described in subclause (I) or (II).

(C) Prohibiting involvement of national parties, Federal candidates and officeholders, and State parties acting jointly

Notwithstanding subsection (e) of this section (other than subsection (e)(3)), amounts specifically authorized to be spent under subparagraph (B)(iii) meet the requirements of this subparagraph only if the amounts—

(i) are not solicited, received, directed, transferred, or spent by or in the name of any person described in subsection (a) or (e) of this section; and

(ii) are not solicited, received, or directed through fundraising activities conducted jointly by 2 or more State, local, or district committees of any political party or their agents, or by a State, local, or district

committee of a political party on behalf of the State, local, or district committee of a political party or its agent in one or more other States.

(c) Fundraising costs

An amount spent by a person described in subsection (a) or (b) of this section to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(d) Tax-exempt organizations

A national, State, district, or local committee of a political party (including a national congressional campaign committee of a political party), an entity that is directly or indirectly established, financed, maintained, or controlled by any such national, State, district, or local committee or its agent, and an officer or agent acting on behalf of any such party committee or entity, shall not solicit any funds for, or make or direct any donations to—

(1) an organization that is described in section 501(c) of Title 26 and exempt from taxation under section 501(a) of such title (or has submitted an application for determination of tax exempt status under such section) and that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity); or

(2) an organization described in section 527 of such title (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

(e) Federal candidates

(1) In general

A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not—

(A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or

(B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds—

(i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of section 441a(a) of this title; and

(ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.

(2) State law

Paragraph (1) does not apply to the solicitation, receipt, or spending of funds by an individual described in such paragraph who is or was also a candidate for a State or local office solely in connection with such election for State or local office if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for

the State or local office sought by such candidate, or both.

(3) Fundraising events

Notwithstanding paragraph (1) or subsection (b)(2)(C) of this section, a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.

(4) Permitting certain solicitations

(A) General solicitations

Notwithstanding any other provision of this subsection, an individual described in paragraph (1) may make a general solicitation of funds on behalf of any organization that is described in section 501(c) of Title 26 and exempt from taxation under section 501(a) of such title (or has submitted an application for determination of tax exempt status under such section) (other than an entity whose principal purpose is to conduct activities described in clauses (i) and (ii) of section 431(20)(A) of this title) where such solicitation does not specify how the funds will or should be spent.

(B) Certain specific solicitations

In addition to the general solicitations permitted under subparagraph (A), an individual described in paragraph (1) may make a solicitation explicitly to obtain funds for carrying out the activities described in clauses (i) and (ii) of section 431(20)(A) of this title, or for an entity whose principal purpose is to conduct such activities, if—

(i) the solicitation is made only to individuals; and

(ii) the amount solicited from any individual during any calendar year does not exceed $20,000.

(f) State candidates

(1) In general

A candidate for State or local office, individual holding State or local office, or an agent of such a candidate or individual may not spend any funds for a communication described in section 431(20)(A)(iii) of this title unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Exception for certain communications

Paragraph (1) shall not apply to an individual described in such paragraph if the communication involved is in connection with an election for such State or local office and refers only to such individual or to any other candidate for the State or local office held or sought by such individual, or both.

MOTION

No. 09-1287

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia

MOTION TO EXPEDITE

Appellants Republican National Committee, California Republican Party, Republican Party of San Diego County, and Michael Steele respectfully move to expedite consideration of this appeal. The government does not oppose this Motion to Expedite.

This case is an as-applied challenge to Sections 323(a) and 323(b) of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 441i(a), which restrict the right of political parties to raise and spend "nonfederal money" that is not subject to the contribution limits and source restrictions imposed by federal law. The case is governed by the judicial review provisions of Section 403 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 113-14. Under BCRA § 403(a)(4), "[i]t shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the

United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal." *Id.* at 114.

On November 13, 2008, appellants filed their complaint in the United States District Court for the District of Columbia. On March 26, 2010—nearly a year and a half later—the three-judge district court entered final judgment in favor of appellees. On April 2, 2010, appellants filed a notice of appeal from the judgment of the district court. On April 23, 2010, appellants filed a jurisdictional statement accompanied by this Motion to Expedite. Appellees' responses are due thirty days after this case is docketed. S. Ct. R. 18.6. In the event the case is docketed on April 23, appellees' responses will be due on May 24.

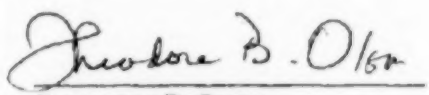
In light of the congressional mandate that this case be "expedite[d] to the greatest possible extent," appellants respectfully request that the Court deny any requested extensions of time for appellees to file their responses to the jurisdictional statement. If the Court is inclined to grant an extension, the period for filing a response to the jurisdictional statement should not be extended beyond June 7, 2010, which is the last day on which a response could be filed in time for the case to be considered by the Court at a conference this Term. Moreover, if the Court notes probable jurisdiction, it should set the case for expedited briefing and argument.

Expedited consideration of this case will not prejudice any party. Indeed, this case was thoroughly briefed by the parties during the nearly year and a half of district court proceedings. The Federal Election Commission, for example, filed a motion to dismiss, a motion for summary judgment, an opposition to appellants' motion for summary judgment, and a supplemental brief regarding this Court's decision in *Citizens United v. FEC*, 130 S.

Ct. 876 (2010). The arguments in appellees' responses to the jurisdictional statement are likely to overlap, to a significant extent, with the arguments already extensively briefed below.

Furthermore, with each day that passes, appellants are continuing to suffer irreparable harm to their First Amendment rights as a result of BCRA's unconstitutional restrictions on their ability to raise and spend nonfederal money to, among things, support candidates in state elections, finance and assist state Republican parties' redistricting efforts, and engage in "grassroots lobbying" efforts to educate voters about legislative issues. Expedited consideration of this case is particularly appropriate in light of the upcoming November 2010 elections, the ongoing census and related redistricting preparations, and current debates about potentially far-reaching legislative measures, such as the present debate over financial services reform. In the absence of expedited review by this Court, appellants will be irreparably denied their First Amendment right to use nonfederal funds to participate in these exceptionally important political events.

Respectfully submitted.



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April 23, 2010

No. 09-1287

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 23rd day of April, 2010, I caused a copy of the foregoing Motion To Expedite to be served by UPS Overnight Mail and e-mail on the counsel identified below, pursuant to Rule 29.5 of the Rules of this Court. All parties required to be served have been served.

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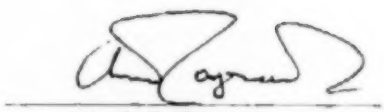

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MOTION

(2)

No. 09-1287

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IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM FOR INTERVENOR-DEFENDANT REPRESENTATIVE CHRISTOPHER VAN HOLLEN, JR.

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QUESTION PRESENTED

Whether appellants' purported "as-applied" challenge to Title I of the Bipartisan Campaign Reform Act of 2002—which limits contributions to political parties—is foreclosed by this Court's decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), which upheld BCRA against the very same arguments that appellants now raise.

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IN THE

Supreme Court of the United States

No. 09-1287

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM FOR INTERVENOR-DEFENDANT REPRESENTATIVE CHRISTOPHER VAN HOLLEN, JR.

STATEMENT

This case arises against the backdrop of *McConnell* v. *FEC*, in which this Court upheld the contribution limitations of Title I of the Bipartisan Campaign Reform Act of 2002 (BCRA) against a facial challenge brought by a group of plaintiffs that included two of the parties now bringing this action. 540 U.S. 93 (2003). In *McConnell*, the plaintiffs advanced virtually the same argument that appellants now recycle under the guise of an "as applied" challenge—*i.e.*, that contributions to political parties that are spent on activities that alleg-

edly are not specifically related to federal elections do not present a risk of actual or apparent corruption and thus lie beyond Congress's power to regulate. This Court rejected that argument, and the Court's decision (which appellants do not ask this Court to overrule) forecloses appellants' challenges here—as the district court correctly concluded. Nothing in *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010), which dealt exclusively with independent *expenditures* by corporations, undercuts *McConnell*'s upholding of *contribution* limits to political parties. This case is, therefore, at most, a footnote to *McConnell*—and, indeed, to *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam). The district court's decision should be affirmed.

1. In the 1970s, the public learned that its government officials had granted favors, positions, and preferential access to donors who had made large political contributions to federal candidates and officeholders. Shaken by the resulting loss of public confidence in the integrity of the political system, in 1974 Congress amended the recently enacted Federal Election Campaign Act of 1971. Neither the 1971 Act nor the 1974 Amendments (collectively, FECA) removed private money from federal campaigns. Rather, FECA set limits on the amount that individuals could contribute to each federal candidate, imposed overall yearly limits on individual political contributions, required expanded disclosure of those contributions, and established the Federal Election Commission (FEC) to enforce the law. FECA also carried forward provisions, first enacted in 1907 and 1947, prohibiting corporations and unions from using their general treasury funds to make contributions in connection with federal elections. At the same time, FECA permitted corporations and unions to contribute to federal candidates and political parties

through segregated funds financed by donations from affiliated individuals (PACs).

2. In *Buckley*, this Court upheld FECA's limits on contributions to candidates and political committees. 424 U.S. at 23-36. The Court found it "unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the [then] $1,000 contribution limitation." *Id.* at 26. *Buckley* identified two distinct threats to the integrity of the nation's political system that supported FECA's contribution limits. First, "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders"—a problem that was "not an illusory one"—"the integrity of our system of representative democracy is undermined." *Id.* at 26-27. Second, and "[o]f almost equal concern," was "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 27. Accordingly, "Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* (internal quotation marks omitted).

In adopting this practical understanding of the threat that unregulated contributions pose to the integrity of the nation's political system, *Buckley* explicitly rejected the notion that bribery laws and disclosure requirements sufficed to address the corrupting influence of unlimited political contributions: "[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with

money to influence governmental action." *Id.* at 27-28. "Congress was surely entitled to conclude ... that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28.

Buckley also upheld a $25,000 aggregate limit on all contributions made by individuals during a calendar year, which included contributions to political parties. 424 U.S. at 38.[1] The Court viewed this contribution limit as a "quite modest restraint upon protected political activity" and "no more than a corollary of the basic individual contribution limitation" to candidates and political committees. *Id.* That was so, the Court explained, because the aggregate contribution limit "serve[d] to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate *through the use of ... huge contributions to the candidate's political party.*" *Id.* (emphasis added).

3. Two years after *Buckley*, the FEC opened a loophole that, in time, undermined much of what Congress had sought to accomplish in 1974. The FEC ruled that political parties could use an allocation formula to spend a combination of FECA-compliant "hard" money and unlimited "soft" money (*i.e.*, money contributed directly by corporations or labor unions, or contributed in excess of the FECA contribution limits) for "mixed ac-

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[1] *See also* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475, 487 (codified as amended at 2 U.S.C. § 441a(a)(1)) (setting contribution limits specific to the political parties in addition to the pre-existing overall contribution limits).

tivities" that affected both federal and state elections. FEC Adv. Op. 1978-10; FEC Adv. Op. 1979-17.

In practice (as Congress later found when it enacted BCRA), the fiction of "mixed activities" allowed political parties to raise and use massive soft-money contributions to influence federal elections, effectively nullifying FECA's contribution limits and restrictions on corporate and union contributions. *McConnell*, 540 U.S. at 126. Not surprisingly, soft-money spending by the national parties grew rapidly, from an estimated $19 million in 1980 to more than $80 million in 1992. App. 44a. This expansion turned into an explosion when, in 1995, the FEC permitted the political parties to use "mixed funds" to finance so-called "issue" advertisements like the ones appellants now seek to finance with soft money. Such advertisements prominently featured candidates for federal office but stopped just shy of using language of "express advocacy." FEC Adv. Op. 1995-25. In the 1996 election cycle, the national parties raised $262 million in soft money. *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 441 n.7 (D.D.C. 2003) (Kollar-Kotelly, J.). By the 2000 election cycle, soft-money contributions reached $495 million, *id.*, and soft money accounted for 42% of the parties' total spending, *id.* at 440.

4. The state political parties also played a significant role in fostering the soft-money loophole. The FEC's allocation rules allowed state political parties to "use a larger percentage of soft money to finance mixed-purpose activities" than the national parties. *McConnell*, 540 U.S. at 124; *McConnell*, 251 F. Supp. 2d at 441 (Kollar-Kotelly, J.); App. 17a, 20a, 26a. As a result, the parties were able to maximize their use of soft money by "transfer[ring] large amounts of their soft money to the state parties."

McConnell, 540 U.S. at 124. In 1996, for example, the national parties transferred $115 million in soft money to the state parties (App. 25a-26a) and, by 2000, soft-money transfers grew to $280 million. *McConnell*, 540 U.S. at 124.

5. As the soft-money loophole emerged, the parties concentrated their fundraising efforts on a small number of very large donors. In the 2000 election cycle, for example, 60% of the soft money (accounting for almost $300 million) came from just 800 donors, each contributing in excess of $120,000. *See McConnell*, 540 U.S. at 124; App. 28a-29a. And, many of these large donors simultaneously contributed hundreds of thousands of dollars to *both* political parties. *See McConnell*, 540 U.S. at 124 & n.12; *McConnell*, 251 F. Supp. 2d at 509 (Kollar-Kotelly, J.); *id.* at 868-869 (Leon, J.); App. 59a-64a.

The abuses that accompanied the explosion of soft money in the 1990s are well documented in the legislative history of BCRA, *see, e.g.*, S. Rep. No. 105-167 (1998), as well as the "reams of disquieting evidence contained in the [*McConnell*] record." 540 U.S. at 153; *see id.* at 146-152; 251 F. Supp. 2d at 467-517 (Kollar-Kotelly, J.). "The evidence in the [*McConnell*] record show[ed] that candidates and donors alike ... exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries." *McConnell*, 540 U.S. at 146. At the donor end of the bargain, "lobbyists, CEOs, and wealthy individuals alike all ... candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials." *Id.* at 147. At the other end of the bargain, the *McConnell* Court concluded, "national parties ... ac-

tively exploited the belief that contributions purchase influence or protection to pressure donors into making contributions." *Id.* at 148 n.47. The *McConnell* Court concluded that this convergence of interests between the national parties and large donors seeking influence over federal officeholders resulted in the "national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 150.

The *McConnell* record also showed that the injection of soft money into the national parties gave rise to instances in which officeholders took specific actions on pending legislation on account of large donations. As this Court concluded, "[t]he evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." *McConnell*, 540 U.S. at 149-150.

6. Congress enacted Title I of BCRA in direct response to this rampant circumvention of long-standing contribution limits and the accompanying threat to the integrity of the national political system. Congress imposed no spending limits, but rather restored the efficacy of FECA by closing the soft-money loophole. Congress subjected all funds received (or solicited) by the national political parties and their officers to contribution limits. BCRA § 101(a), FECA § 323(a) (codified at 2 U.S.C. § 441i(a)). As a necessary corollary, moreover, BCRA imposed contribution limits on funds used by the political parties' state and local committees for federal election activities. BCRA § 101(b)(1), FECA § 323(b)(1) (codified at 2 U.S.C. § 441i(b)(1)).

7. Various entities—including appellants Republican National Committee (RNC) and California Repub-

lican Party (CRP)—challenged the constitutionality of BCRA's soft-money provisions. *McConnell*, 251 F. Supp. 2d at 206. This Court upheld Sections 323(a) and (b) in their entirety. The *McConnell* Court asked whether Section 323's limits on contributions to the parties were "'closely drawn' to match 'a sufficiently important [government] interest.'" 540 U.S. at 136 (quoting *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003)); *see also Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 387-388 (2000); *Buckley*, 424 U.S. at 25. In so doing, *McConnell* adhered to an uninterrupted line of decisions that have given less-exacting scrutiny to contribution limits than to expenditure limits, *see McConnell*, 540 U.S. at 134-137, and that have shown deference to Congress' "significantly greater institutional expertise ... in the field of election regulation," *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring).

In applying "closely drawn" scrutiny, the Court rejected the plaintiffs' characterization of Section 323 as a spending regulation, holding that "it is irrelevant that Congress chose in § 323 to regulate contributions on the demand rather than the supply side" and that "neither [§ 323(a) nor § 323(b)] in any way limits the total amount of money parties can spend." 540 U.S. at 138-139. These provisions, the Court found, "simply limit the source and individual amount of donations." *Id.* at 139. The Court accordingly dismissed as irrelevant plaintiffs' objection that Section 323(a) regulates all contributions to the national parties, including funds "spent on purely state and local elections in which no federal office is at stake." *Id.* at 154.

The Court also reaffirmed the holdings of *Buckley* and subsequent cases that, in the context of contribution limits, the government's anti-corruption interest is

"not limited ... to the elimination of cash-for-votes exchanges." *McConnell*, 540 U.S. at 143; *see also id.* at 153-154. To the contrary, "'[i]n speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' [the Court had] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 143 (quoting *Shrink Missouri*, 528 U.S. at 389).

Turning to BCRA, the Court held that this government interest justifies Section 323(a)'s restrictions. Given "the reams of disquieting evidence contained in the record," 540 U.S. at 153, the Court upheld "Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption." *Id.* at 154. Further, based on that same massive record, the Court concluded that Section 323(a) is narrowly tailored to achieve the government's anti-corruption interest. In this respect, the Court concluded that "the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, ... have made *all* large soft-money contributions to national parties suspect." *Id.* at 154-155 (emphasis added).

With respect to Section 323(b), the Court held that its targeted regulation of the state and local parties' financing of *federal* election activity, 2 U.S.C. § 431(20), advanced the government's anti-corruption interest. 540 U.S. at 164-165. Further, the Court concluded that Section 323(b) was also instrumental to avoiding wholesale evasion of Section 323(a)—a "hard lesson of circumvention" having been taught "by the entire history of campaign finance regulation." *Id.* at 165. The Court

concluded that, because large contributions made to support "federal election activity"—such as voter registration and get-out-the-vote efforts—"can be used to benefit federal candidates directly," they "pose the greatest risk of this kind of corruption." *Id.* at 167.

8. In the present case, the RNC and its Chairman challenge Section 323(a)'s restrictions on receiving or soliciting soft-money contributions, purportedly "as applied" to a number of activities in which they intend to engage. These activities include so-called "issue" ads, redistricting activities, and support for state-office candidates in both off-cycle and dual federal-state elections. JS App. 7a. CRP and the Republican Party of San Diego County (SDRP) challenge Section 323(b)'s regulation of contributions to the state and local parties that are used for federal election activity, purportedly "as-applied" to CRP's and SDRP's intended ads attacking or opposing federal candidates in connection with certain ballot initiatives and to other intended campaign activities in dual state-federal elections. JS App. 9a, 19a. Implicitly recognizing that providing soft-money donors with preferential access to federal officials is problematic, the RNC promises that "it will not arrange or facilitate meetings, conference calls, or other kinds of contact between soft-money contributors and federal candidates and officeholders 'in any manner *different than* or *beyond that* currently afforded to contributors' of hard money." JS App. 8a (emphasis added). According to appellants, these promises eliminate any need for Section 323(a) and make its continued enforcement against them unconstitutional.

9. The three-judge district court unanimously rejected appellants' challenges, concluding that they are all foreclosed by *McConnell*. First, the court held that, to the extent the RNC's "as-applied" challenge was

based on the claim that contribution limits could be applied only to funds raised by the national parties for federal electoral purposes, its argument was "not so much an as-applied challenge as it was an argument for overruling" *McConnell*, which "upheld § 323(a) against a facial challenge based on the same applications of the statute that the RNC now raises." JS App. 13a. Second, the court dismissed CRP's and SDRP's "as-applied" challenges to Section 323(b) because they "are essentially the same arguments considered and rejected in *McConnell*." JS App. 20a-21a. Third, the court held that, notwithstanding the RNC's pledge not to have federal officials raise soft money or to grant soft-money donors greater access to federal candidates and officeholders than it already provides to its top federal-dollar contributors, *McConnell* forecloses the RNC's argument that its proposed activities do not give rise to a risk of actual or apparent corruption. JS App. 15a-18a.[2] Finally, the court rejected the RNC Chairman's attack on Section 323(a)'s restriction preventing national-party officers from soliciting soft money in their official capacity. It held that, "[u]nder *McConnell*, there is no reason to think that contributions made *to* a national party and contributions made *at the behest* of a national party are any different in terms of their potential ability to produce corruption or the appearance of corruption." JS App. 23a-24a.

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[2] The three-judge court assumed, without any factual or legal basis (JS App. 8a n.4), that the FEC would be able to enforce the RNC's promises.

ARGUMENT

This is not a case of first impression. Each and every one of the challenges appellants raise was considered and rejected by this Court in *McConnell*. Appellants' Jurisdictional Statement neither urges this Court to overrule the portion of *McConnell* that upheld Title I of BCRA nor even mentions the *stare decisis* considerations that dictate whether a controlling precedent should be overruled. *See Citizens United* v. *FEC*, 130 S. Ct. 876, 912 (2010).[3]

Nevertheless, appellants argue that, "as applied" to each of their intended uses of soft money, Section 323 fails to advance a valid governmental interest. JS 11-20. Yet, appellants wholly fail to explain how their supposed "as-applied" challenge differs from the facial challenges that the Court rejected in *McConnell*. Nor can appellants claim a constitutional exemption from BCRA merely by pledging to behave in a manner that supposedly would meet Congress's concerns about the appearance of corruption; a law does not become unconstitutional just because one party subject to it promises, in hedged terms, not to act contrary to one of its purposes. *Citizens United* similarly provides no assistance to appellants, for that case involved independent expenditures and reemphasized that the regulation of

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[3] A footnote in appellants' jurisdictional statement suggests that "FECA §§ 323(a) and (b) may well be unconstitutional in *all* their applications" (JS 20 n.4), but this oblique comment is insufficient to raise or preserve a facial challenge to BCRA. It does, however, amount to a tacit acknowledgment that appellants' arguments for their as-applied challenge are irreconcilable with the reasoning of *McConnell*'s holding that Title I is facially constitutional.

expenditures and *contributions* raise fundamentally distinct constitutional considerations. 130 S. Ct. at 909. Finally, appellants' argument that political parties have been severely and unconstitutionally disadvantaged vis-à-vis other political actors relies on reasoning that was squarely rejected in *McConnell* and, in any event, ignores reality.

I. THIS COURT'S DECISION IN *MCCONNELL* FORECLOSES EACH OF APPELLANTS' CHALLENGES TO SECTION 323

A. Under *McConnell*, The RNC's Proposed Use Of Soft Money Is "Beside The Point"

In *McConnell* v. *FEC*, this Court considered and rejected the central argument on which the RNC's claims rest—that the constitutionality of Section 323(a)'s restrictions on contributions to national parties depends on the nature of the activities for which those contributions are ultimately used. JS 14, 17-20. There, the plaintiffs advanced the contention—which appellants recycle in this case—that Section 323(a) violates the First Amendment because "it subjects *all* funds raised and spent by national parties to FECA's hard-money source and amount limits, including, for example, funds spent on purely state and local elections in which no federal office is at stake." 540 U.S. 93, 154 (2003). The Court unequivocally dismissed that argument as simply "beside the point." *Id.* The Court explained that "Section 323(a), like the remainder of § 323, regulates contributions, not activities." *Id.*

Appellants purport to raise an "as-applied" challenge to Section 323, but they offer no plausible way to distinguish the factual and legal claims in this case from those raised in *McConnell*. In *McConnell*, the Court made clear that soft-money contributions to national political parties foster a risk of actual and apparent cor-

ruption, "*regardless of how those funds are ultimately used.*" *Id.* at 155. (emphasis added). Appellants' promise that soft money will be spent only on certain activities is thus "beside the point." 540 U.S. at 154. It is not how soft money is spent that gives rise to the risk of actual or apparent corruption; rather, the *McConnell* Court held that it is "the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect." *Id.* at 154-155. Accordingly, appellants do not raise a genuine "as-applied" challenge to Title I of BCRA. And, even if appellants' challenge were properly conceived as an "as-applied" challenge, their arguments would still fail: They were raised and rejected in *McConnell*, on a record whose constitutionally significant facts encompass those here, and thus should not be reconsidered here.

B. *McConnell* Considered And Rejected CRP's And SDRP's Challenges

McConnell also squarely forecloses CRP's and SDRP's "as-applied" challenges. In upholding Section 323(b), *McConnell* considered each of the types of activities that CRP and SDRP seek to finance with unlimited soft-money contributions—*i.e.*, public communications that attack or oppose federal candidates, 2 U.S.C. § 431(2)(A)(iii), voter registration, voter identification, get-out-the-vote activity, and other generic campaign activity in connection with dual state-federal elections, 2 U.S.C. § 431(2)(A)(i)-(ii). The Court concluded that, because large contributions made to support these state-party activities "can be used to benefit federal candidates directly," such contributions "pose the greatest risk ... of corruption." 540 U.S. at 167.

CRP and SDRP do not—and cannot—identify any facts distinguishing their proposed activities from the activities this Court considered in *McConnell*. That their intended ads attacking federal candidates might also support or oppose state ballot initiatives is irrelevant; *McConnell* sustained the constitutionality of Section 323(b) regardless of whether a communication to which it applies is "'targeted'" at federal elections, (JS App. 21a), since "*any* public communication" by a state or local party that "attacks a clearly identified federal candidate" implicates the federal anti-corruption interest. 540 U.S. at 170 (emphasis added). Similarly, it is irrelevant that CRP and SDRP seek to "target[]" their get-out-the-vote drives and other federal campaign activities to non-federal candidates in dual elections—whatever that might mean in practice. JS 6.[4] *McConnell* concluded that because these state and local party activities inevitably "confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." 540 U.S. at 168.

C. The RNC's Pledges Not To Grant Preferential Access To Soft-Money Donors Do Not Give Rise To A Proper As-Applied Challenge

The RNC's studiously worded pledges that it will not have federal officeholders raise soft money nor will it provide preferential treatment to soft-money donors "in any manner different than or beyond that currently

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[4] Notably, in *McConnell*, too, plaintiffs pointed to the state and local parties' activities in connection with ballot initiatives in support of their challenge to Section 323(b). *See* Political Parties Br. 53-55, *McConnell*, 540 U.S. 93. The Court, of course, upheld Section 323(b) in its entirety. 540 U.S. at 161-174.

afforded to contributors" (JS App. 8a, 14a-15a; JS 15) cannot release the RNC from this Court's holding in *McConnell*. Carried to its logical conclusion, appellants' attempt to construct an "as-applied" challenge based on behavioral pledges would permit all manner of circumvention of the law. Under the logic of appellants' position, for example, the operator of an adult theater would be able to circumvent any facially valid zoning ordinance addressing the danger of criminal activity resulting from the operation of adult theaters simply by pledging that he will serve only well-meaning customers whose patronage will not increase crime in the area. *See, e.g., City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Indeed, appellants' logic would permit candidates to escape limits on contributions made directly to them merely by promising not to be corrupted by large gifts of money. Surely, that cannot be the law, for it would preclude Congress from adopting prophylactic rules—a proposition that is at odds with the holding in *Buckley* and virtually every contribution limit case since then.

But, in any event, appellants do not envision a fundraising environment materially different from the one that existed before, and led to, the enactment of BCRA. In *McConnell*, too, the RNC said that "'access' to federal officeholders is [not] *uniquely* granted to nonfederal donors as a result of their donations to political parties" and that "'federal officeholders are [not] more likely to meet with nonfederal donors than with federal donors.'" Political Parties Br. 26-27, *McConnell*, 540 U.S. 93 (citation omitted). The *McConnell* Court, nonetheless, rejected the relevance of that contention, holding, among other things, that federal officeholders and candidates will inevitably become aware of the identities of large soft-money donors, 540

U.S. at 147, and that, as a result, unregulated contributions pose a unique risk of actual or apparent corruption. Nothing appellants have proposed differs from what the Court considered and rejected in *McConnell*.

D. This Court Has Recognized The Close Relationship Between National Parties And Their Federal Candidates And Officeholders

Appellants argue that "contributions to political parties are not the equivalent of direct candidate contributions." JS 15. However, even if this statement is true, it is not a basis for holding Section 323 unconstitutional, for the Court has long recognized that large contributions to political parties are a means of circumventing limitations on contributions to candidates. In *Buckley* v. *Valeo*, for example, this Court upheld FECA's $25,000 limit on aggregate yearly contributions to candidates, political committees, and political party committees as a "quite modest restraint ... to prevent evasion of the $1,000 contribution limitation" by, among other things, "huge contributions to the candidate's political party." 424 U.S. 1, 38 (1976).

Moreover, *McConnell* could not have been clearer that national parties and federal candidates and officeholders are "'inextricably intertwined,'" 540 U.S. at 155, have a "close connection and alignment of interests," *id.*, and "enjoy a special relationship and unity of interest," *id.* at 145. *McConnell* concluded that "'[t]here is no meaningful separation between the national party committees and the public officials who control them.'" *Id.* at 155 (quoting *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 468-469 (D.D.C. 2003) (Kollar-Kotelly, J.)). And, according to *McConnell*, it was precisely this "close relationship between federal officeholders and the national parties, as well as the means by which parties

have traded on that relationship, that ... made all large soft-money contributions to national parties suspect." *Id.* at 154-155.

Pointing to observations in *Colorado Republican Federal Campaign Committee* v. *FEC ("Colorado I")*, 518 U.S. 604 (1996), and *FEC* v. *Colorado Republican Federal Campaign Committee ("Colorado II")*, 533 U.S. 431 (2001), appellants assert that "there is no '"metaphysical identity" between party and candidate,'" JS 15-16 (quoting *Colorado II*, 533 U.S. at 447-448). But those observations are irrelevant to the issue of *contributions to* political parties; rather, they concerned *expenditures by* political parties—as this Court pointed out in *McConnell*, 540 U.S. at 145 n.45. And although the Court in *Colorado II* recognized that "[p]arties ... perform functions more complex than simply electing candidates," it also noted that "they act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452; *see also id.* at 450-451. This Court has thus consistently recognized that unlimited contributions to political parties present the same danger of corruption and appearance of corruption as is created by unlimited contributions to candidates—and on that basis has upheld Congress's reasonable regulation of such contributions. Appellants present no basis for overruling this settled law.

II. NOTHING IN *CITIZENS UNITED* UNDERMINES *MCCONNELL*'S RATIONALE FOR UPHOLDING SECTION 323

Citizens United neither implicitly overruled *McConnell*'s holding that Title I of BCRA is constitutional nor undermined the foundation of that holding. Rather, *Citizens United* dealt with the entirely distinct question whether Congress may regulate independent *expenditures* by corporations. It did not address *con-*

tribution limits and the very different constitutional standards that apply in that context.

A. Congress May Limit Contributions To Avoid The Risks Of Favoritism Toward And Improper Influence By Large Contributors

Appellants concede (JS 11)—as they must—that Section 323 is not subject to strict scrutiny, since it regulates contributions and not expenditures.[5] Instead, the government need only satisfy the "lesser demand" of showing that Section 323 is "'closely drawn' to match 'a sufficiently important [governmental] interest.'" *McConnell*, 540 U.S. at 136.[6]

Appellants, nonetheless, seek to divorce the holding of *Citizens United* from its context. *Citizens*

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[5] In a footnote, appellants contradict their concession by arguing that Section 323 operates as a spending limit in that it restricts political parties from "'spend[ing] any funds that are not subject to [BCRA's] limitations, prohibitions, and reporting requirements.'" JS 11 n.2 (quoting 2 U.S.C. § 441i(a)(1)). This argument was squarely rejected in *McConnell*, where the Court made clear that Section 323 was not an expenditure limit merely because Congress chose "to regulate contributions on the demand rather than the supply side." 540 U.S. at 138. *Citizens United* did not in any way alter this holding. *See* 130 S. Ct. at 909 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subject to rigorous First Amendment scrutiny.").

[6] *See also Randall* v. *Sorrell*, 548 U.S. 230 (2006) (plurality opinion of Breyer, J., joined by Roberts, C.J. and Alito, J.) (applying "closely drawn" scrutiny to contribution limits); *FEC* v. *Beaumont*, 539 U.S. 146 (2003) (same); *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (same); *California Med. Ass'n* v. *FEC*, 453 U.S. 182 (1981) (plurality opinion) (same); *Buckley*, 424 U.S. 1 (same); *see also Colorado II*, 533 U.S. 431 (same with respect to coordinated expenditures).

United did not hold, as appellants suggest, that the government must always be oblivious to the risks of generating favoritism, undue influence, gratitude, and preferential access—regardless of the context in which the regulation arises. To the contrary, *Citizens United* dealt only with the unique demands of strict scrutiny and the regulation of independent expenditures. Nothing in the Court's decision addresses what types of governmental interests are sufficient to meet the "less rigorous" requirements of "closely drawn" scrutiny, *McConnell*, 540 U.S. at 136 n.39, much less undermines the Court's holding in *McConnell* that Title I of BCRA meets that standard.

Nor was *McConnell*'s holding in this respect at all novel. Indeed, in *Buckley*, the Court held that contribution limits are justified not only by apparent or "actual *quid pro quo* arrangements," but also by "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27. Similarly, in *Shrink Missouri*, 528 U.S. at 389—again, in the context of addressing contribution limits—the Court relied on the corrupting "threat" of "improper influence" and "politicians too compliant with the wishes of large contributors" as the basis for upholding contribution limits such as those challenged today. *See also Colorado II*, 533 U.S. at 440-441 (noting that corruption extends beyond explicit cash-for-votes agreements to "undue influence on an officeholder's judgment"). *Citizens United* did not disturb this Court's long history of recognizing government interests beyond the prevention of actual or apparent *quid pro quo* corruption as a sufficient justification for contribution limits under closely drawn scrutiny.

B. BCRA's Soft-Money Restrictions Permissibly Curb The Risk Of Actual Or Apparent *Quid Pro Quo* Corruption

Even if *Citizens United* did somehow narrow the anti-corruption interest that can support limits on *contributions*—an issue that was not before the Court—the Court's holding in *McConnell* remains both sound and binding. The record in that case contained abundant evidence of actual or apparent *quid pro quo* arrangements resulting from soft-money donations to political parties. "The evidence," for example, "connect[ed] soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." *McConnell*, 540 U.S. at 150 (record citations omitted). The Court, moreover, specifically rejected the contention, repeated by appellants here (JS 18), that vote selling is necessary for *quid pro quo* corruption, and explained that "[t]o claim that such [non-voting] actions d[id] not change legislative outcomes ... misunderst[ood] the legislative process." *Id.* Accordingly, the Court held that "there exists real or apparent corruption" notwithstanding the lack of "concrete evidence of an instance in which a federal officeholder ha[d] actually switched a vote." *Id.* at 149.

Moreover, to the extent *Citizens United* mentioned contribution limits at all, it embraced *Buckley*'s conclusion that contribution limits can be sustained even on a record that does not include specific instances of actual *quid pro quo* corruption. As the Court explained, "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 130 S. Ct. at 908. The Court noted that "[t]he *Buckley* Court, nevertheless, sustained limits on direct contributions in

order to ensure against the reality or appearance of corruption." *Id.*

Indeed, in defining the government's interest in preventing *quid pro quo* arrangements, *Buckley* pointed to instances in which donors had obtained access to President Nixon by pledging large donations and where the President later took action favorable to the donors. *Buckley*, 424 U.S. at 27 n.28; *Buckley* v. *Valeo*, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975) (en banc). Notably, "[i]t [wa]s not material" to determine "whether the President's [subsequent administrative] decision was in fact, or was represented to be, conditioned upon or 'linked' to the reaffirmation of the pledge." 519 F.2d at 839 n.36. Whether or not an *actual quid pro quo* exchange had occurred, the selling of access, combined with a subsequent favorable government action, was sufficient to create an appearance of *quid pro quo* corruption. *McConnell*, likewise, concluded that "[i]t was not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption." 540 U.S. at 154. *Citizens United* does not undercut that holding.

C. BCRA Does Not Unfairly Disadvantage Political Parties

Appellants argue that the loosening of restrictions on corporate expenditures in *Citizens United* puts the political parties at an unfair disadvantage because corporations may now spend unlimited general treasury money on political activities while political parties may not raise soft money for "nonfederal activities." JS 20, 22. This argument both misconceives the reasons underlying the soft-money restrictions and ignores the enormous resources the political parties have at their disposal.

First, as *McConnell* made clear and *Citizens United* affirmed, Section 323 "regulates *contributions*, not activities." *McConnell*, 540 U.S. at 154; *Citizens United*, 130 S. Ct. at 910-911 ("The BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money." (citations omitted)). It restricts the source and amount of donations political parties can accept, but leaves them as free as corporations to *spend* money, without restriction, on electoral advocacy, grassroots advocacy, and other political activities.

Indeed, the distinction in treatment to which appellants object "has existed to some extent since *Buckley*," *EMILY's List* v. *FEC*, 581 F.3d 1, 22 (D.C. Cir. 2009), which upheld the $25,000 limit on aggregate yearly contributions to candidates, political committees, and parties, *Buckley*, 424 U.S. at 38. Most notably, after BCRA was enacted, various groups other than political parties "remain[ed] free to raise soft money to fund" the type of activities that appellants complain that they cannot fund with soft money, and, in *McConnell*, the RNC argued that Title I of BCRA violated equal protection "because it discriminates against political parties in favor of special interest groups." 540 U.S. at 187-188; *see* Political Parties Br. 2, 91-99, *McConnell*, 540 U.S. 93. This Court, however, rejected that challenge, stressing that "BCRA actually favors political parties in many ways," and concluded that Congress was "fully entitled to consider the real-world differences between political parties and interest groups." 540 U.S. at 188. As the Court wrote, "[i]nterest groups do not select slates of candidates for elections" and "do not determine who will serve on legislative committees,

elect congressional leadership, or organize legislative caucuses." *Id.*

Second, appellants' argument that political parties are now hobbled in the political marketplace beggars plausibility. In the 2007-2008 election cycle, the Republican national party committees received hard-money contributions of $640,308,267, and the Democratic national party committees received hard-money contributions of $599,107,722.[7] Funds in excess of a total of a billion dollars are certainly sufficient to raise the voices of the national parties above "the level of notice." *McConnell*, 540 U.S. at 173 (internal quotation marks and citation omitted). Given these numbers, it is farfetched, to say the least, to suggest that the political parties will find it difficult to compete with corporations, unions, or nonprofit advocacy groups.

CONCLUSION

The judgment of the district court should be affirmed.

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[7] *See* Center for Responsive Politics, *Political Parties Overview, available at* http://www.opensecrets.org/parties/index.php?cmte=&cycle=2008 (last visited May 21, 2010) (sum of contributions to the three national committees of each party).

Respectfully submitted.

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APPENDIX

APPENDIX

[Expert Report of Thomas E. Mann in *McConnell* v. *FEC*, 540 U.S. 93 (2003)]

I. Qualifications

My name is Thomas E. Mann. I am the W. Averell Harriman Chair and Senior Fellow at the Brookings Institution. I served as Director of the Governmental Studies Program at Brookings between 1987 and 1999 and as Executive Director of the American Political Science Association from 1981 to 1987. I earned my Ph.D. in political science at the University of Michigan in 1977, specializing in elections, parties, public opinion, Congress, and American political behavior. A copy of my complete CV is attached.

I have written or edited numerous books and articles on these and related subjects. I have taught at Princeton University, Johns Hopkins University, the University of Virginia, Georgetown University and American University and delivered invited lectures at many other colleges and universities and at scholarly meetings. I was elected a Fellow of the American Academy of Arts and Sciences and presented with the Charles E. Merriam Award (for "a significant contribution to the art of government through the application of social science research") and the Frank J. Goodnow Award (for "distinguished service") by the American Political Science Association.

Over the last decade, much of my research and writing has focused on campaign finance in the United States and in other countries. In 1995, I assembled a Brookings Working Group on Campaign Finance Reform to evaluate alternative approaches to reform (Brookings 1996). I also started a campaign finance reform Web site at Brookings, which is regularly updated

with materials on campaign finance law, administration, and politics (www.brookings.edu/campaignfinance). After the 1996 elections I joined several other scholars in analyzing the most serious problems with the campaign finance regulatory regime and in formulating a strategy to deal with those problems. We produced a report entitled "Five Ideas For Practical Campaign Reform," which was widely circulated in the policy community (Ornstein et al. 1996). Based on this work, I took an active role in the public debate on campaign finance reform over the last six years. In 1997, I co-edited *Campaign Finance Reform: A Sourcebook*; in 2002, I co-authored a reformatted and updated edition of this volume, which is being published by Brookings as *The New Campaign Finance Sourcebook*. I have not testified as an expert at trial or by deposition in any other case within the last four years.

II. Introduction and Summary

My primary purpose in preparing this statement is to provide a description and analysis of the development of federal campaign finance law and practice leading up to the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA). I will briefly review the major laws passed by Congress to regulate the flow of money in federal elections during the first half of the 20th century—most importantly the bans on corporate and union treasury funding of federal elections—as well as the central features of the regulatory regime defined by the 1974 amendments to the Federal Election Campaign Act (FECA). I will then discuss how that regime was undermined by the emergence of party "soft

money"[1] and of electioneering under the guise of issue advocacy. Finally, I will discuss how the collapse of the FECA regime has transformed the role of political parties, elected officials, corporations and unions in the electoral process and created glaring conflicts of interest and a widespread perception of corruption in the policy process.

III. Early Legislative History

Financing campaigns for federal office has been a concern of party and elected officials since mass suffrage emerged in the Jacksonian era of the 1820s and 1830s. The need to communicate with a growing number of voters required parties to raise increasing amounts of campaign funds. For the next half-century, party leaders relied primarily upon an extensive patronage system for campaign money (Pollock 1928). But the passage of the Pendleton Civil Service Act of 1883, which outlawed party assessments on federal officeholders, initiated the end of one political financing era and the start of another. Soon political parties turned to the private sector, particularly corporations, for campaign funds. By the election of 1896, under the direction of William McKinley's legendary campaign strategist Mark Hanna, corporations were called upon to provide the bulk of campaign funds (Overacker 1932; Thayer 1973).

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[1] Soft money is an informal term that refers to "nonfederal" funds raised by political parties outside of federal limits on the source or size of contributions and ostensibly used for purposes other than influencing federal elections. Hard money refers to federal funds raised, spent, and publicly disclosed according to terms set by federal law.

Critics charged that corporations and other wealthy donors were corrupting government and gaining special favors in return for their campaign gifts. In 1904, Democratic presidential nominee Alton B. Parker charged that corporations were providing President Theodore Roosevelt large campaign donations to buy influence with the administration. Roosevelt denied the charge but subsequently issued calls for campaign finance reform in his 1905 and 1906 messages to Congress. In 1907 Congress passed the Tillman Act, which prohibited corporations and national banks from making contributions in connection with federal election campaigns (Corrado 1997).

Subsequent reforms were enacted to require disclosure of campaign receipts and expenditures (1910), to limit expenditures in federal campaigns (1911), to broaden disclosure and raise spending limits (1925), and to limit contributions to federal candidates and national political parties (1940). But in each case, Congress failed to establish an effective enforcement mechanism or to close obvious loopholes, rendering the practical consequences of the legislation much less significant than the stated objectives (Overacker 1932; Sorauf 1988; Corrado 1997). Political parties remained the major financial intermediaries throughout the first half of the century, relying heavily on a relatively small number of large individual donors (Overacker 1932; Heard 1960).

The growth of organized labor as a political force in national politics led Congress in 1943 to enact a ban on union treasury contributions in federal elections comparable to the corporate ban in the Tillman Act. Because this measure was adopted as a war measure, it automatically expired six months after the end of the war. It was made permanent by the Taft-Hartley Act

of 1947 and, like the ban on corporate donations, has been a permanent feature of federal election law ever since (Corrado 1997).

The rise of television and the increasingly candidate-centered nature of federal election campaigns after World War II led to a substantial increase in campaign costs and growing concerns about political financing. But it was not until the early 1970s that Congress began to wrestle seriously with the shortcomings of the old system and the challenges of the new. The Revenue Act of 1971 created a presidential public financing system funded with an income tax check-off, but its effective date was delayed until the 1976 election. Congress also passed the Federal Election Campaign Act of 1971 (FECA), which strengthened reporting requirements and repealed existing limits on contributions and expenditures that had proven ineffective. But it retained the ban on corporate and labor union contributions. It also put new limits on the amount candidates could contribute to their own campaigns and on expenditures for media advertising in presidential, Senate, and House elections (Sorauf 1988).

The fundraising scandals associated with Watergate and the committee to reelect President Richard Nixon—featuring attaché cases stuffed with thousands of dollars, illegal corporate contributions, and conduits to hide the original source of contributions—led Congress to return to the campaign finance drawing board (Sorauf 1988). In 1974, they produced major amendments to FECA, which constituted the most serious and ambitious effort ever to regulate the flow of money in federal elections.

IV. The FECA Regulatory Regime

The 1974 amendments scrapped the 1971 limits on media advertising but replaced them with an elaborate set of limits on contributions and expenditures. The amendments also provided for public financing of presidential elections and created a new agency, the Federal Election Commission (FEC), to administer a strengthened disclosure system and to enforce the other provisions of the law. Barely a year after the 1974 amendments to FECA were signed into law, the Supreme Court in *Buckley v. Valeo* upheld the constitutionality of the contribution limits, disclosure requirements, and the presidential public financing system. But it struck down the limits on expenditures (by a candidate's campaign, by a candidate with personal funds, or by others spending independently), except for voluntary limits tied to public financing in presidential elections, and narrowed the class of political communications by independent groups subject to disclosure and limits on the source and size of contributions. For the purposes of this report, two sets of provisions are particularly germane: those governing the role of corporations and labor unions, and those governing political parties.

A. Corporations and Labor Unions

The new regulatory regime included one very familiar element: a ban on corporate and union contributions and expenditures in connection with a federal election. FECA added some enforcement bite to these decades-old prohibitions by also making it unlawful for anyone to accept such contributions. Two exemptions from this ban were included in the law. The first, the press exemption, specified that the term "expenditure" does not include "any news story, commentary, or editorial distributed through the facilities of any broad-

casting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." The second, the internal communications exemption, permits corporations to communicate with their restricted class (i.e. stockholders and executive and administrative personnel and their families) and unions to communicate with their members without any limitations. Finally, while continuing the ban on the use of general treasury funds of corporations and unions in connection with a federal election, the new law allowed thse [sic] organizations to set up political committees as separate segregated funds. These funds, one form of political action committee (PAC), whose administrative and fundraising expenses may be paid for by their parent corporation or union, raise voluntary contributions from their restricted classes and are subject to federal limitations (Potter 1997).

The intent of Congress as revealed by these provisions in the 1974 amendments to FECA was to ensure that corporate and labor union treasuries not be tapped to finance general federal election campaign activity. Decades of disappointing experience with earlier bans on corporate and union funding led not to a repeal of such bans but to a more rigorous regulatory strategy to make them enforceable.

B. Political Parties

The 1974 amendments to FECA treated political party committees as a type of "political committee" that is required to register with the FEC and is subject to federal limitations on amounts and sources of contributions. The latter included a prohibition on donations from corporations and labor unions. But party committees, as part of the official political party structure at

the national, state, or local level, were treated differently than other political committees in several respects. Individuals could contribute up to $20,000 per year to national party committees and an additional $5,000 to a state party committee. Party committees could transfer unlimited sums to other party committees without such transfers being treated as contributions. The national committees of each party could together contribute $17,500 during an election cycle to a candidate for the U.S. Senate. And national and state parties could make limited "coordinated" expenditures on behalf of their federal candidates. The expenditure amounts varied by office and state population, and were indexed to inflation.

With one exception, no reference was made in the law to different types and purposes of party accounts, one subject to the limitations of federal law, the other not. The text of the law includes no mention of "federal" or "nonfederal" accounts, much less "hard" or "soft" money. The sole exception to the law's limitations on contributions to party committees was that donations to building funds of national or state parties were exempt.

C. Groundwork for Soft Money

As soon as these limits on party funding went into effect in the 1976 elections, two sets of concerns—dealing with grassroots activity and the federal system—arose about the interpretation and impact of the law as it applied to political parties. The first—that traditional grassroots party activity was inappropriately and harmfully being subjected to limits on coordinated party spending—led Congress in 1979 to amend FECA. The 1979 revision is widely but inaccurately believed to have created soft money. Instead, soft

money resulted from the response of the FEC to a second concern arising out of the federal system: how best to accommodate the fact that party organizations have roles in both federal and nonfederal election activity.

1. The 1979 Amendments to the FECA

One important feature of the 1979 amendments to the FECA was designed to allow state and local parties to spend unlimited amounts of funds raised under the act for grassroots campaign materials and activities. Much of the traditional party paraphernalia and volunteer activities was reduced in the 1976 elections on the presumption that the FECA required them to be treated as in-kind contributions from the parties to federal candidates and therefore subject to limits. Congress in 1979 narrowly defined three sets of election-related activities by state and local parties that were exempt from the limitations on party contributions to and coordinated spending on behalf of federal candidates. These included grassroots campaign materials (e.g. yard signs and bumper stickers), slate cards and sample ballots, and voter registration and get-out-the-vote (GOTV) activities on behalf of the party's presidential ticket. Congress specified that these exempted sets of activities did not include the use of any broadcasting, newspaper, magazine, billboard, direct mail or other general public communication or political advertising. Moreover, to qualify for these exemptions from limitations on contributions and coordinated spending by parties, funds for these exempt activities had to be raised in compliance with FECA. In other words, the 1979 amendments did not authorize national party committees to accept unlimited contributions or to accept corporate or union treasury funds. They simply expanded the use that state and local parties could

make of their federal (hard money) funds (Corrado 1997a).

2. FEC Rulings on Federal and Nonfederal Funds

An entirely separate set of administrative actions was laying the predicate for national parties to begin raising funds not subject to federal source and amount restrictions. The FECA limited party financing of activities conducted in connection with federal elections. But what of state and local elections? Parties clearly have interests in elections for state and local office. Many state campaign finance laws are more permissive than federal law, allowing contributions from corporations and unions and higher or unlimited donations from individuals and PACs[2]. (Some, albeit many fewer, are more restrictive.) To what extent do federal restrictions apply when party activities have an impact on both federal and state and local elections? The FEC began grappling with this question soon after it was established. In a series of advisory opinions, the Commission sought to ensure that a portion of state party activities benefiting both federal and nonfederal candidates be paid for with hard money. In Advisory Opinion 1975-21, the Commission ruled that a local party committee had to use hard dollars to pay for a part of its administrative expenses and voter registration drives, on the grounds that these functions have an indirect effect on federal elections. It used this opinion in regulations it issued in 1977 governing allocation of administrative expenses between federal and nonfed-

[2] Table 1 summarizes the provisions of each state's law governing contributions to political parties, based on information available from the Federal Election Commission as of 2000.

eral accounts. The allocation was to be made "in proportion to the amount of funds expended on federal and non-federal elections, or on another reasonable basis" (11 CFR 106.1(e) 1978).

The next year the Commission took an even tougher position on the use of nonfederal funds for voter registration and GOTV activities by party committees. In response to a request for guidance from the Illinois Republican State Central Committee, the Commission in Advisory Opinion 1976-72 approved the allocation of party overhead and administrative costs between federal and nonfederal accounts, based on the proportion of federal to state races being held that year. But it prohibited the use of nonfederal funds to finance such federal election-related activities as voter registration and GOTV: "Even though the Illinois law apparently permits corporate contributions for State elections, corporate/union treasury funds may not be used to fund any portion of a registration or get-out-the-vote drive conducted by a political party" (FEC AO 1976-72).

Less than two years later the Commission reversed its position. The Kansas Republican State Committee requested permission to use corporate and union funds, which were legal under Kansas law, to finance a portion of their voter drive that would benefit federal and state candidates. This time the Commission agreed, concluding in Advisory Opinion 1978-10 that expenses for voter registration and GOTV should be allocated between federal and nonfederal accounts in the same manner as party administrative costs.

At this point the FEC rulings on party financing had been made in response to state party requests for guidance on how the financing of their traditional ac-

tivities was affected by the new federal election law. What emerged was that state parties had to maintain both federal and nonfederal accounts and allocate funds from the two accounts in a manner consistent with federal law. Direct assistance to federal candidates must be financed exclusively with federal funds. Comparable assistance to state and local candidates could be funded entirely with nonfederal funds. State party overhead and administrative expenses were to be allocated proportionately between federal and nonfederal accounts. Initially voter registration and GOTV were treated in the same way as aid to candidates—as a federal election activity requiring exclusively federal funds—but then the FEC reversed course and allowed state parties to allocate the costs of voter drives between the two accounts (FEC AD 00-95 2000).

Soon national party officials argued that the Commission rulings recognizing federal and nonfederal state party roles and financing arrangements should apply to them as well. They contended that national parties assist candidates for federal, state and local office; that they work with state and local party organizations on a variety of party-building and campaign activities; and that, therefore, they too ought to be able to maintain separate federal and nonfederal accounts, finance their nonfederal election activity with nonfederal funds, and allocate administrative and other expenses for joint federal/nonfederal activities between the two accounts. The Commission agreed. In Advisory Opinion 1979-17, it stated that a national party committee could establish a separate account "for the deposit and disbursement of funds designated specifically and exclusively to finance national party activity limited to influencing the nomination or election of candidates for public office other than elective 'federal office'" (FEC

AO 1979-17). The Commission thereby permitted the national parties to raise corporate and union funds and solicit unlimited donations from individuals "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office" (FEC AO 1979-17).

V. The Rise of Soft Money

Thus, at the same time Congress permitted state and local party organizations to spend unlimited amounts of federal funds on certain grassroots activities that benefited federal as well as state and local candidates, the FEC allowed parties (including national party committees) to pay for a share of the costs of these joint activities with funds not subject to federal limits. The convergence of these two regulatory changes set the stage for the solicitation and expenditure of so-called "soft money" in the 1980 election cycle. Soft money could be raised by national, state or local party committees, under limits, if any, set only by state, not federal law, and used to finance the ostensibly nonfederal share of the costs of these joint federal/nonfederal party activities.

A. Developments in the 1980s

The national parties quickly took advantage of this opportunity. They solicited funds for their nonfederal accounts from corporations, unions, and individuals who had already given the maximum amount permitted by federal law. The parties used these soft dollars to cover a portion of their administrative and fundraising costs as well as to finance a share of GOTV activities in states targeted for their presidential ticket or for crucial Senate races. The national parties often took the lead in raising the requisite amount of hard and soft

dollars, which they then transferred to the state party committees that were conducting the voter drives (Alexander 1983; Alexander and Haggerty 1987; Alexander and Bauer 1991; Corrado 1997a).

Soft money became an important part of national party finance beginning in the 1980 election. Just what amount of soft money activity the parties pursued in the 1980s is less certain. "Nonfederal" funds were not subject to federal disclosure requirements, only to the disclosure laws in states where soft money was spent. Many of these state requirements were nonexistent or ineffective. Thus, we have to rely on estimates of soft money activity in the 1980s rather than official reports of receipts and expenditures. Herbert Alexander, then director of the Citizens Research Foundation, is widely acknowledged as the most authoritative source of party campaign finance data during this period. Starting with the 1992 election cycle, when the FEC first began collecting and reporting data on nonfederal as well as federal accounts of national party committees, we can use official FEC data. Building on Alexander's work and FEC data, Anthony Corrado has assembled the best available data on national party spending between 1976 and 1998. I have updated his table with FEC data on the 2000 election cycle, added a column that computes soft money spending as a share of all national party spending, and reproduced it as Table 2 in this report. Chart 1 graphically displays the changes between 1976 and 2000. Table 3 presents party hard and soft money expenditures adjusted for inflation.

In 1980 the national Republican party spent roughly $15 million in soft money, the Democrats $4 million. This constituted 9% of total spending by the two national parties. In 1984 the amount of soft money spent by the national parties increased marginally to

$21.6 million but it constituted a smaller share (5%) of total national party activity. In 1988, however, that pattern was altered. Party soft money spending more than doubled to $45 million, which was 11% of national party totals, and the Democrats reached parity with the Republicans on the soft money side of the ledger.

During this decade the national party committees explored the most efficient methods of allocating expenses between federal and nonfederal accounts and the most advantageous ways of spending soft money. The FEC approved alternative methods of allocation but gave party committees wide leeway in using "any reasonable basis" (11 CFR 106.1(e) 1978). Naturally, the parties found most attractive those allocation methods that allowed them to pay for as much of their expenses as possible with soft money. Priority in spending soft money was given to GOTV programs conducted by state party committees in presidential battleground states. The national parties also came to rely on soft money to cover an increasing share of the costs of their staff and operating expenses. By 1988, both parties had developed effective means of courting large soft money donors. After the election, Republicans revealed that they had received gifts of $100,000 each from 267 donors; Democrats counted 130 donors contributing $100,000 or more (Alexander and Bauer 1991).

The rise of soft money did not go unnoticed or unchallenged. In 1984, Common Cause petitioned the FEC to issue new rules relating to the use of soft money, based on the charge that party committees were unlawfully using nonfederal funds to influence federal elections. The Commission denied the petition in 1986, but Common Cause challenged that denial in the U.S. District Court. The court rejected the group's

argument that no allocation method is permissible under FECA but agreed that the Commission's policy of allowing state party committees to allocate expenses for certain joint activities on "any reasonable basis" was contrary to law. It directed the Commission to replace this permissive standard with more specific allocation formulas. As part of that directive, the court stated that the Commission could "conclude that no method of allocation will effectuate the Congressional goal that all moneys spent by state political committees on those activities permitted in the 1979 amendments be 'hard money' under the FECA" (*Common Cause v. FEC* 1987).

After an arduous rulemaking process and a return to the District Court by Common Cause with a petition for enforcement of the court's order, the Commission issued new soft money rules in 1990, effective January 1, 1991 (FEC 1990). The rules placed no restrictions on the sources or size of contributions to party nonfederal accounts, and they did not limit the amount of such soft money that could be spent. They did require all national party committees to file regular reports of their nonfederal receipts and disbursements with the FEC, and they required state party committees to report their soft money disbursements made in connection with federal elections. The regulations also replaced the "any reasonable basis" standard for allocating the costs of activities that influence both federal and state and local elections with a set of specific allocation methods. They also specified that the method to be used by party committees depended on the type of committee incurring the expense and the type of activity for which expenses were to be allocated.

National party committees were required to allocate a minimum of 65% of their administrative and ge-

neric voter drive expenses in presidential election years to their federal accounts, 60% in nonpresidential years. For state and local parties, the allocation of these expenses was determined by the proportion of federal offices to all offices on the state' s general election ballot. This provision produced a large range among the states in the percentage of hard money required, but the average was substantially lower than that applying to the national committees. Joint fundraising expenses for all party committees were allocated based on the amount of federal and nonfederal funds raised. The cost of party communications was allocated according to the relative time or space devoted to federal and nonfederal candidates.

These soft money regulations effectively routinized the raising and spending of soft money by the national parties (Corrado 1997a). The FEC rules gave the parties explicit guidelines on how to spend soft money on activities that benefit federal as well as state and local candidates without risking an enforcement action. They also provided the national parties with ways of increasing the share of their costs that could be paid for with soft money. One such method—transferring federal and nonfederal funds to state parties to take advantage of more favorable allocation formulas—would become a major element of national party funding strategy in the years ahead.

B. The 1992 Election

It was no surprise, therefore, to see soft money activity proceed apace in the 1992 election. (Since this was the first election in which soft money contributions and expenditures were reported to the FEC, the soft money figures reported below for the 1992 election cycle and after are based on FEC data.) Spending almost

doubled again over the preceding presidential election cycle, from $45 million to $80 million, although this time with the Republicans outpacing the Democrats. (See Table 2 for nominal figures, Table 3 for inflation-adjusted figures.) Soft money as a share of total spending by the national parties jumped five percentage points to 16%. Both parties sought contributions of $200,000 or more from their top donors and put a high priority on soliciting corporate gifts. Table 4 lists the top 50 soft money contributors in the 1992 election cycle, with donations ranging from $206,207 to $1,374,500. (This table, as well as those reporting comparable data for the 1996 and 2000 election cycles, displays total amounts contributed and breaks those amounts down by party and by the percentage contributed from the organization's treasury.) Three of the four congressional party campaign committees—the Democratic Congressional Campaign Committee (DCCC), the National Republican Campaign Committee (NRCC), and the National Republican Senatorial Committee (NRSC)[—]began to mount serious soft money operations. Together they raised more than $20 million in the 1992 election cycle. The fourth—the Democratic Campaign Committee (DSCC)—continued to raise soft money only for its building fund (Alexander and Corrado 1995).

The national parties exerted firm control over the ways in which soft money was spent. The primary goal was to support the election of federal, not nonfederal, candidates. Barely $2 million of the $80 million in "nonfederal funds" spent by the national parties in the 1992 elections was contributed directly to state and local candidates. The two national parties transferred almost $15 million to state party committees; each party directed two-thirds of its soft money transfers to ten

presidential election battleground states. The bulk of these funds was used to finance voter identification and GOTV phone bank programs, typically according to a plan approved in advance by the national party. These voter mobilization activities benefited state and local as well as federal candidates in the targeted states, and state parties receiving these transfers were also able to use some of the funds to hire party workers, update voter lists, and pay for fundraising expenses. But the primary focus of these efforts orchestrated by the national parties was unmistakably the federal election (Alexander and Corrado 1995).

Another major use of soft money in the 1992 elections was "generic" party advertising. These mostly television ads, run in key states to reinforce the message of the presidential candidates, were financed on the party-building rationale of the FEC's allocation rules for joint federal/nonfederal activities. Around $14 million was expended for this purpose. The ads did not mention the names of the candidates. (The assumption was that only hard money could be used for such candidate-specific ads, as part of the parties' coordinated spending budget.) Instead they urged viewers to "Vote Republican" or "Vote Democratic" or stressed themes articulated in the presidential campaigns (Alexander and Corrado 1995).

By the end of the 1992 election cycle, students of political parties and campaign finance came to recognize that important elements of party financing of federal elections were at variance with the FECA and with the initial rulings of the FEC that allowed the national parties to raise and spend soft money for limited purposes. Congress had sought to keep corporate and union money out of federal elections and to limit the size of individual contributions. Both objectives were

undermined, however, by the growing role of soft money, which allowed national party officials and federal officeholders to solicit unlimited contributions and steer them in ways that would benefit their federal election campaigns. Initially, the Commission approved only the use of nonfederal or soft money accounts of the national parties "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office" (FEC AO 1979-17). Yet later the FEC allocation rules allowed much more generous shares of nonfederal or soft money than could be justified by the state and local campaign activity they financed. Only a trickle of soft money was directly contributed to or spent on behalf of state and local candidates. Some soft money helped state party organizations mobilize support for state and local candidates and expand their staffs and activities. But a major share of these "nonfederal" funds raised by national parties was spent to influence the outcome of federal elections. Soft money had become primarily a component of federal election financing, not a means of funding state and local election activity (Alexander and Corrado 1995; Sorauf 1992).

C. The 1996 Election Cycle: The Soft Money System Transformed

The accommodative regulatory environment, the failure to index for inflation the FECA limits on contributions to candidates and parties, and competitive pressures in presidential elections combined to increase demand for soft money. Between 1980 and 1992, the parties became more adept at raising nonfederal funds from corporations, unions, and wealthy individuals and directing them toward locations and activities that would advance their presidential and congressional

tickets (Alexander and Corrado 1995). But no one had yet questioned that there were still limits to what the parties could accomplish with soft money. While soft money was growing in importance, it remained a relatively small part of national party committee budgets. (See Table 2 and Chart 1.)

The increased activity of the national parties during this period was largely accomplished with hard money. The parties adapted well to the new environment of modern campaigning and FECA financing, in important part by becoming repositories of professional expertise and building effective networks linking candidates with donors and consultants (Herrnson 1988). Relatively generous coordinated spending limits gave them license to provide substantial direct assistance in elections, financed by contributions raised under the FECA. It was clear that effective campaigning required a large component of candidate-focused communications. And that, everyone assumed, required hard money.

1. Issue Advocacy

That view changed in the next presidential election cycle, thanks to the audacious move by then President Bill Clinton and his political consultant, Dick Morris, to finance an ambitious political advertising campaign under the guise of "issue advocacy." Starting in the fall of 1995 and continuing through the middle of 1996, Democratic party committees spent an estimated $34 million on television ads designed to promote Clinton's reelection. While the ads prominently featured the President, none of these costs were charged as coordinated expenditures on behalf of Clinton's campaign. Instead the party paid the entire cost, based on a legal argument never before made: that party communica-

tions which did not use explicit words advocating the election or defeat of a federal candidate could be treated like generic party advertising and financed, according to the FEC allocation rules, with a mix of soft and hard money. Such communications were forms of issue advocacy, it was argued, and neither subject to the spending limits that apply to presidential candidates accepting public funding, nor wholly subject to the limits on the source and size of contributions to political parties (Green 1999; Corrado 2000).

This argument, and the embrace of issue advocacy as a form of electioneering, had its genesis in *Buckley*. In that decision, the Court established an express advocacy test as a way of narrowing the scope of disclosure requirements and contribution limits for independent expenditures in light of a concern that the language crafted by Congress in the 1974 amendments to FECA was unconstitutionally vague and overbroad (Potter 1997a). The standard was defined by the Court as communications that "in express terms advocate the election or defeat of a clearly identified candidate for federal office." The Court elaborated in a footnote examples of express advocacy, which became known as the "magic words" test.

This express advocacy standard was constructed to determine which communications by individuals and groups independent of any candidate or party would be subject to regulation. The Court did not require express advocacy in candidate and political party ads for their financing to be subject to federal campaign finance laws. *Buckley* stated that spending by candidates and political committees (including parties) is "by definition, campaign-related." Students of campaign finance thought it an extraordinary leap for a presidential candidate, especially one accepting public funding,

and a national political party to argue that the express advocacy standard gave them license to craft and broadcast unlimited political ads and to finance them in large part with soft money (Green 1999; Corrado 2000; Citizens Research Foundation 1997; Mann 1999).

2. Parties, Issue Advocacy and Soft Money

The express advocacy standard had little noticeable effect on the conduct and financing of federal campaigns for almost 20 years after it was set by the Court. It took the creativity and bravado of Morris and Clinton and the failure of the FEC to challenge their use of party soft money to finance television ads promoting the President's agenda and accomplishments to open the flood gates (Corrado 2000). In May of 1996, the Republican National Committee announced a $20 million "issue advocacy" advertising campaign. Its purpose, in the words of the chairman, would be "to show the differences between Dole and Clinton and between Republicans and Democrats on the issues facing our country, so we can engage full-time in one of the most consequential elections in our history" (Corrado 2000). These presidential candidate-specific ads, like the Democratic ones, were targeted on key battleground states and financed with a mix of hard and (mostly) soft money. Both parties were now financing a significant part of the campaigns of their presidential candidates outside of the strictures of the FECA and well beyond the bounds of the 1979 FEC ruling that national parties may raise corporate and union funds and solicit unlimited donations from individuals "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office."

Very quickly the parties began to use the same funding strategy to campaign on behalf of their con-

gressional candidates; outside groups did likewise (Green 1999; Corrado 2000). For groups, the advantage of electioneering through "issue advocacy" rather than through FECA "independent expenditures" was that the former could be conducted without disclosure and could be financed with soft (i.e. unregulated) rather than hard money. This meant that both political parties and groups could solicit contributions from corporations and unions as well as from wealthy individual donors to finance candidate-specific electioneering communications. Moreover, those same corporations and labor unions could tap their own treasuries to run such electioneering communications themselves or through convenient, largely anonymous intermediary organizations. Research on the 1996 election revealed extensive and elaborate efforts by parties, candidates, unions, corporations and groups to exploit this new issue advocacy loophole to avoid the strictures election law (Annenberg Public Policy Center 1997; Green 1999; Corrado 2000).

This research also suggested some degree of coordination among parties, groups and candidates in creating and broadcasting these issue advocacy electioneering communications. Published accounts by former White House insiders and the report of the Senate Committee that investigated campaign finance practices in the 1996 election contain detailed information about President Clinton's personal role in authorizing the "issue ad" campaign, editing the ads, selecting locations for their broadcast, and raising the funds needed to pay for them (Morris 1997; U.S. Senate Committee on Governmental Affairs 1998). Similar reports have been made of possible coordination between parties and outside groups regarding the strategic use of issue advocacy electioneering communications to shape the out-

come of federal elections (*AFL-CIO v. Federal Election Commission* 2001). The Supreme Court's distinction between independent advocacy and advocacy coordinated with a candidate was critical to its finding that limits on independent expenditures were unconstitutional. Yet as issue advocacy emerged as a tool for electioneering communication in the 1996 election, it threatened to undermine a central feature of the FECA: that communications designed to help a candidate but not treated as contributions must be made independent of that candidate.

3. Demand for Soft Money Intensifies

The increased demand created by this novel interpretation of nonfederal election activity led to more than a threefold increase in national party soft money activity between 1992 and 1996—from $80 million to $272 million. (See Table 2.) Soft money as a share of total national party spending jumped from 16% to 30%. Both parties and their elected officials worked hard to solicit soft money donations from corporations, wealthy individuals, and labor unions. During the 1996 election the national party committees received nearly 1,000 contributions from individuals in excess of $20,000 (the annual federal party contribution limit) and approximately 27,000 contributions from federally prohibited sources (Corrado 2000). Table 5 contains the top 50 soft money donors in the 1996 election cycle; their contributions ranged from $530,000 to $3,287,175.

Less than $10 million of the $272 million was contributed directly to state and local candidates in the 1996 cycle, only 3.5% of the soft money spent by the parties. The two parties transferred a total of $115 million in soft money to state party committees, which financed two-thirds of state party soft money expendi-

tures. The national Democratic party managed to finance two-thirds of its pro-Clinton "issue ad" television blitz by taking advantage of the more favorable allocation methods available to state parties. They simply transferred the requisite mix of hard and soft dollars to party committees in the states they targeted and had the state committees place the ads. State party soft money expenditures for political communication/advertising jumped from less than $2 million in 1992 to $65 million in 1996 (La Raja 2001). State parties enjoyed positive spillover effects from this national party campaign strategy, in terms of covering some of their staffing and administrative costs. But there is no doubt that they were used by national party officials as vehicles for implementing their newly-developed strategy of federal electioneering under the guise of issue advocacy (Green 1999; Corrado 2000).

After the 1996 election, the FEC audit division concluded that the party issue advertising campaigns should have been treated as campaign expenses of the two presidential candidates and thereby subject to spending and contribution limits. The Commission rejected the finding and unanimously declined to take any punitive action against the parties or their presidential candidates. The Commission also rejected the general counsel's recommendation for an enforcement proceeding, based on the conclusion that the party's issue ads were coordinated with the Clinton campaign and therefore constituted illegal campaign contributions and expenditures (Corrado 2002). What had seemed a daring test (if not outright violation) of the boundaries of federal election law in 1996 had now received the de facto blessing of the Federal Election Commission. There remained few effective constraints on the ability of parties and other political actors to campaign for and

against specific candidates for federal office with unlimited amounts of soft money.

D. The 1998 and 2000 Elections: A Regulatory Regime in Disarray

The 1998 midterm election cycle saw the parties focus their soft money strategy on Senate and House elections. The total amount of soft money spent—$221 million—was less than in 1996 but more than double the previous midterm election. And soft money as a share of total spending by the national parties jumped to 34%. (See Table 2.) The congressional party campaign committees put a premium on raising and spending soft money to advance the election prospects of their candidates. The two Senate campaign committees effectively abandoned formal coordinated expenditures on behalf of their candidates and delegated this financing tool to state parties. The DSCC made $12.3 million in coordinated expenditures in the 1994 midterm elections; that amount dropped to $8,424 in 1998. The NRSC spent $10.9 million of hard money in coordination with their candidates in 1994; the comparable amount in 1998 was $36,775. Both national party committees had discovered they could finance campaign activity on behalf of their senatorial candidates with soft money in the form of "issue advocacy." The same pattern, more pronounced with the Democrats than the Republicans, was evident in the House campaign committees (FEC 1999).

This was also the first election cycle in which scholars systematically monitored the issue advocacy campaigns of parties and groups, on television and on the ground (Krasno and Seltz 2000; Magleby 2000, 2000a; Krasno and Goldstein 2002). Anecdotal evidence had previously suggested little difference in purpose and

content between express advocacy and candidate-specific issue advocacy communications financed by parties and groups. This research by political scientists soon confirmed that suspicion. The evidence of the explicit electioneering purpose of candidate-specific issue advocacy near the election was overwhelming. Such electioneering issue ads run by parties and groups were largely indistinguishable from the campaign ads of candidates. Very few candidate ads used words of express advocacy; virtually all party issue ads mentioned the name of a federal candidate, mostly in an attack mode, but few mentioned the name of the party; and almost every issue ad featuring the name of a candidate and running near an election was clearly designed to support or attack a candidate, not to express a view on an issue. Voters were unable to differentiate candidate-specific issue ads (broadcast and print) sponsored by parties and outside groups from campaign ads run by candidates. Parties and outside groups used issue advocacy as a cover to finance campaigns for and against federal candidates in targeted races.

Given the breakthrough in the use of soft money to fund candidate-focused campaign ads in 1996, the FEC's decision not to pursue this apparent violation of law and regulation, and the emergence of issue advocacy as the campaign weapon of choice in the 1998 congressional elections, it is no surprise that soft money financing of party campaigning exploded in the 2000 election cycle. Soft money spending by the national parties reached $498 million, now 42% of their total spending. (See Table 2.)

Raising a half billion dollars in soft money took a major effort by the national parties and elected officials, but they had the advantage of focusing their efforts on large donors. That focus paid substantial divi-

dends: 800 donors (435 corporations, unions and other organizations and 365 individuals), each contributing a minimum of $120,000, accounted for almost $300 million or 60 percent of the soft money raised by the parties (Rogers 2001). The top 50 soft money donors, displayed in Table 6, each contributed between $955,695 and $5,949,000. Among the many soft money donors who gave generously to both parties were Global Crossing, Enron, and WorldCom (Makinson 2001).

The Republican and Democratic National Committees provided the soft and hard money needed to boost the campaigns of their presidential candidates in key battleground states. Electioneering issue ads were a central component of the political strategies of both presidential candidates and were fully integrated into the campaigns (Magleby 2002; Corrado 2002). One estimate based on monitoring television ads in the 75 largest media markets between June 1 and election day suggests the parties spent $3 on issue advocacy communications in the presidential campaign for every $1 they spent on express advocacy communications (Holman and McLoughlin 2001). Once again, the transfer of funds to state parties, which then placed the ads, provided the most efficient allocation method.

The House and Senate party campaign committees were especially active in the soft money arena. Together they spent $219 million in 2000, more than ten times their soft money activity in 1992. As in 1998, they largely abandoned the hard money coordinated expenditure route to assisting their candidates and focused their campaign activity on issue advocacy and GOTV, both of which could be financed with a large portion of soft dollars. For the first time, the two Democratic campaign committees actually raised and spent more unrestricted soft money than regulated

hard money (FEC 2001; Corrado 2002; Magleby 2002). Research monitoring national party campaign activities in the 2000 election cycle confirms a massive increase in party federal electioneering activities—over the air and on the ground—in targeted states and districts and financed largely with soft money (Krasno and Goldstein 2002; Magleby 2002; Magleby 2003; Holman and McLoughlin 2001).

A total of $280 million in soft money—well over half the amount raised by the six national party committees—was transferred to state parties, along with $135 million in hard money. By contrast, the national parties contributed only $19 million directly to state and local candidates, less than 4% of their soft money spending and 1.6% of their total financial activity in 2000 (FEC 2001).

By the end of the 2000 election cycle, it simply was not credible to argue that soft money was exclusively or even primarily being used for state and local election activity. Nor was it credible to argue that "issue ads" run by national and state parties were anything other than communications intended to influence the outcome of federal elections. The evidence that national parties were raising soft money, not subject to federal limits, and using it by working through state parties to influence federal elections was decisive. The language in *Buckley* that spending by parties is "by definition, campaign-related" was given powerful empirical support. Scholars might differ about how best to change the campaign finance system, but they could not avoid the conclusion that party soft money and electioneering in the guise of issue advocacy had rendered the FECA regime largely ineffectual.

VI. Potential Corruption of the Policy Process

The developments in campaign finance law and practice reviewed in this report altered the behavior of private groups, political parties and elected officials in ways that raised serious concerns about potential corruption of the policy process. Those concerns led Congress to enact BCRA, which repairs the tears in the regulatory fabric and in many ways reinstates the campaign finance system in operation after the 1974 FECA amendments and *Buckley*.

A. Corporations and Unions

With the collapse of the firewall between corporate and union treasuries and federal election campaign activity, corporations and unions have assumed a financial role in the electoral process that is contrary to longstanding intentions of Congress. The FECA provided that corporations could participate in federal elections through voluntary PACs, internal communications with their shareholders and administrative employees, and individual contributions to candidates and parties from company executives. Each of these avenues of participation is well traveled. But corporations now draw directly on their treasuries to provide the largest share of soft money raised by both political parties, which in turn finances federal campaign activity (Makinson 2001). They finance extensive "issue advocacy" electioneering communications, directly and indirectly through other groups, in targeted federal races (Krasno and Seltz 2000; Annenberg Public Policy Center 1997, 2001; Holman and McLoughlin 2001). As a consequence, contrary to the objective specified in law by Congress as far back as 1907 and recodified and strengthened several times since, corporations today are major players in U.S. federal elections. And that, in

turn, alters their relationship with those who hold and seek public office.

Beginning in the 1940s, Congress acted to constrain labor union participation in federal elections in a manner similar to that for corporations. Unions can form voluntary political action committees. In fact, the Congress of Industrial Organizations (CIO) formed the first such political organization in 1943, shortly after Congress acted to ban unions from spending treasury funds on federal elections (Sorauf 1988). Perhaps most importantly, the internal communications exemption allows unions to allocate substantial resources from their treasuries to mobilize their members in key federal elections (Alexander and Corrado 1995). But like corporations, they now use treasury funds to make soft money contributions to political parties and to finance electioneering communications under the guise of issue advocacy. While unions overall provide a relatively small share of party soft money receipts, five individual unions were among the ten largest soft money donors in the 2000 election cycle. (See Table 6.) The AFL-CIO was one of the first nonparty groups in 1996 to seize the opportunity to broadcast electioneering ads under the guise of issue advocacy (Dwyre 1999); they continue to avail themselves of that opportunity today (Magleby 2002). So labor unions too have taken a more direct role in federal elections than was traditionally contemplated by federal law.

B. Political Parties

Political parties play an indispensable role in democratic societies, aggregating public preferences, organizing teams of candidates and elected officials, and providing a means of democratic accountability. Political scientists have also traditionally valued parties for

nurturing volunteer grassroots political participation, fostering broader electoral competition by supporting challengers to incumbents, and diluting the influence of organized interests.

The rise of soft money has led many scholars to question whether these comparative advantages of political parties have been compromised by developments in campaign finance practice (Kelley 2002; Sorauf and Krasno 1998; Brennan Center 2001a; Mann 2002). Do parties dilute the influence of large donors, or facilitate their access to policymakers? Do parties operate independent of incumbent officeholders, or are they largely instruments of those incumbents? Does soft money support party-building and grassroots activities, or is it used primarily to finance communications about specific federal candidates? Are state parties independent actors in the soft money era, or are they more agents of national parties and politicians? While no scholarly consensus exists on the answers to these questions, the preponderance of evidence from recent research supports the position that the relationship between party soft money, private interests, and federal candidates and officeholders has created serious concerns about the integrity of the policy process and respect for the rule of law.

Most importantly, soft money has led the parties to become the avenue by which elected officials and large private donors frequently come together. The national party committees are dominated by elected public officials—the president or presidential candidate in the case of the Republican and Democratic National Committees, the top House and Senate party leaders for the congressional campaign committees (Shea 1995; Dunn Tempas 1997; Sorauf and Krasno 1998; Corrado 2000; Dwyre and Kolodny 2002). There is no meaningful

separation between the national party committees and the public officials who control them. As described above, the congressional party campaign committees have become very large soft money operations in recent elections. This party fundraising depends crucially on the active involvement of each party's highest-ranking elected officials. As inducements for large contributions, policymakers grant access and provide opportunities for face-to-face discussions in intimate settings with the party's most prominent public officials. Presidents and congressional party leaders devote a significant amount of their time to raising soft and hard money for their party committees as well as to assisting candidates directly. And top elected officials and their political strategists determine how party resources—including importantly soft money—are allocated in presidential and congressional elections.

Parties also provide an instrument for individual politicians to raise and spend funds for their own campaigns that would not otherwise be permissible by law. The final report of the Senate Committee on Governmental Affairs on the *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns* chronicles the extraordinary lengths to which Democratic and Republican elected officials went to raise party soft money for their "issue advocacy" advertising blitzes in the 1996 election cycle. The tactic of choice for many 2000 Senate candidates was the "joint fundraising committee." These candidate/party committees gave candidates an opportunity to solicit contributions, often from the same donor, for three campaign pots: up to $2,000 for the candidate's campaign committee, an additional amount of up to the maximum of $20,000 for the party committee's hard money account, and then any additional individual con-

tribution (or donation from a corporation or union) to the party's soft money account. The latter two could be transferred to the candidate's state party and used for issue advocacy or GOTV activities that would benefit that candidate's campaign (Corrado 2002).

Since the soft money-financed campaign activities of the parties must be mixed with some portion of hard dollars, the party committees also work assiduously to raise the requisite matches. Here too congressional party leaders have played a crucial role, by encouraging their colleagues in Congress, especially those representing relatively safe seats, to transfer funds from their personal campaign committees and leadership PACs to candidates in tight races and to party campaign committees. This encouragement has lately taken the form of party fundraising quotas on members of Congress. Federal election law permits unlimited transfers from members' campaign committees to party committees. In the 2000 election cycle, 15% of the hard money receipts of the House party campaign committees came from member contributions (Malbin and Bedlington 2002).

National party links to elected officials and large private donors are mirrored in their ties to state parties. Whatever the positive spillover effects on state party-building and voter mobilization (La Raja 2001; Ansolabehere and Snyder 2000), the evidence summarized above supports the conclusion that since the advent of soft money, national parties have used state parties primarily as vehicles for advancing federal election campaign objectives. The state parties have been willing partners with their national counterparts in seizing the opportunities presented by the soft money system to boost their federal candidates. "The relationship between the national parties and their state par-

ties has never been closer than it is today" (Morehouse 2000). From a reform perspective, however, this means that any successful attempt to limit national party soft money activity must perforce prevent easy evasion through surrogates such as state and local parties.

There are some who have argued that parties will be weakened by the elimination of soft money and that electoral competition will suffer (La Raja 2001). It is true that substantially more money is crossing party books and that they have a major presence in battleground states and districts across the country. But the evidence suggests that soft money has created as many or more problems for parties and done little to nurture grassroots participation or electoral competition (Brennan Center 2001; Magleby 2000, 2003; Corrado 2002). In fact, the period in which the party soft money system exploded has coincided with a decline in competition in congressional elections (Ornstein, Mann, and Malbin 2002). I am aware of no evidence supporting the proposition that party soft money activities counter or reduce the advantages of incumbency. This may be because the two parties—dominated by elected officials consumed with the immediate goal of winning the marginal seat that might determine which party controls the majority—concentrate their "issue advocacy" spending in the same handful of targeted contests rather than looking to the medium or long term by investing in a somewhat larger number of potentially winnable seats (Krasno 2003). The provision in BCRA increasing hard money contributions limits to parties will in any case cushion if not entirely match the absence of soft money.

C. The Policy Process

These new and altered roles in the electoral process for corporations, unions and political parties raise troubling questions about the integrity of the policy process. Congress banned corporate contributions in federal elections out of concerns that concentrated wealth and the advantages of incorporation could distort and corrupt democratic government. Labor unions were subjected to comparable regulation to neutralize the political benefits that might result from their publicly-facilitated organizational strengths. Large and unlimited individual contributions were proscribed by Congress to prevent the buying of access to or special treatment by government officials. Yet each of these pillars of federal election law has been undermined by the rise of the soft money system and electioneering issue advocacy in U.S. elections. Very large institutional and individual donors have returned to Washington.

No single motivation can possibly explain the behavior of all of these large soft money donors. Some enjoy being viewed as "players" in their parties; some hope to help one of the parties hold or gain the White House and Congress; some bank on better access, a more sympathetic hearing, or more favorable treatment from federal officials; others give defensively in response to aggressive solicitation by party and elected officials—a cost of doing business in Washington. But since most of the largest soft money donors had high stakes in decisions made by Washington policymakers, the public has a substantial basis for its concerns about conflicts of interest and corruption of the policy process (Magleby and Patterson 1994).

Since the Supreme Court's *Buckley* decision, corruption or the appearance of corruption has been the dominant legal rationale for regulating campaign finance. Scholars have sought to measure whether campaign contributions corrupt the policy process by buying votes in Congress. Most of this research has examined the connections between PAC contributions (a surrogate for interested money) and votes in the House and Senate (Sorauf 1992; Wright 1996). There is little statistical evidence that campaign contributions to members of Congress directly affect their roll call decisions. Party, ideology, constituency, mass public opinion and the president correlate much more with voting behavior in Congress than do PAC contributions. When these variables are less significant, there is evidence that interest group contributions, particularly to junior members of Congress, have influenced roll call votes—for example, on financial services regulation (Stratmann 2002). The targets of influence are less often victories on final roll-call votes than assistance, sympathy or access at some earlier stage of the legislative process (Hall and Waymann 1990).

In any event, this literature is often used to buttress the argument that political contributions do not corrupt the policy process. This is an odd inference, since it is based on studies of contributions that are limited as to source and size for the very purpose of preventing corruption or its appearance. PAC contributions are capped at $5,000 per election, an amount whose real value has shrunk by two-thirds since it was enacted in 1974. Are we to assume that studies of contributions of $50,000 or $500,000 or $5 million from corporations, unions and individuals would produce the same generally negative findings? What if the route of influence is not through individual members or on roll

call votes? What if large soft money donors give generously to both political parties?

A more sophisticated understanding of the organizational features of Congress and of the multiple forms of political contributions leads one to take seriously the potentially corrupting effects of political contributions. Initial work along these lines suggests a myriad of ways in which groups receive or are denied favors beyond roll-call votes (Hall and Wayman 1990; Hall 1996; Beckmann and Hall 2002). Members can express public support or opposition in various legislative venues, offer amendments, mobilize support, help place items on or off the agenda, speed or delay action, and provide special access to lobbyists. They can also decline each of these requests. Beyond the chamber floor, venues include rules governing floor consideration, party leadership, party caucuses, standing committees and subcommittees, conference committees, and other collections of members inside the House and Senate. Groups may use their campaign contributions in conjunction with their lobbying operations to reinforce or activate rather than convert members. They may also try to curry favor by running helpful electioneering issue advocacy campaigns for or against particular federal candidates. Moreover, in the executive branch, influence can be sought over appointments and access to decision-making forums, as seen in recent revelations about the Enron Corporation.

The currency of campaign contributions extends well beyond PAC contributions to members' campaign committees. These include brokered if not bundled individual contributions, contributions to leadership PACs controlled by members, contributions to parties and candidates in targeted races and informally credited to members, soft-money contributions to parties

and section 527 committees connected to members, and direct expenditures on "issue ad" campaigns. The ways and means of potential influence (and corruption) are much more diverse than those investigated in the early scholarly research.

The dramatic growth of soft money and the intimate involvement of elected officials in raising and spending that money to influence federal elections makes that potential influence and corruption all the more serious. That potential for abuse is most vividly illustrated by the series of reports issued by the Center for Responsive Politics tracking patterns of soft money contributions by groups with a strong interest in pending legislation (Keen and Daly 1997; Corrado 2000). Prominent examples include the tobacco, telecommunications, and oil and gas industries. In each case millions of dollars in soft money contributions were made to the national and congressional party committees of both parties as Congress was considering legislation that would significantly affect those industries. These are only several of the most noteworthy examples of a widespread phenomenon: most corporate soft money donors have a major stake in federal policymaking and many contribute to both major parties.

Seen from this practical vantage point, parties do not dilute the influence of large donors or insulate elected officials from direct connections with those donors; they instead facilitate and broker such connections. The rise of soft money and of electioneering in the guise of issue advocacy has put parties in the unfortunate position of middleman between large private interests seeking public favors and ambitious elected officials aggressively soliciting large political contributions from those private interests. The FECA and its legislative predecessors banning corporate and union fund-

ing of federal elections were designed to reduce the glaring conflicts of interests that arise when those with high stakes in congressional and regulatory agency actions make large political contributions. That purpose has been undermined by the developments reviewed in this report.

Whatever the mix of motivations, parties, elected officials and private interests have been linked in a deceitful game—one based upon the transparent lie that soft money is being raised and used for purposes other than influencing federal elections. That game has been characterized by a constant search for funding conduits and rationales that allow political actors to evade the strictures of federal election law. It has exacerbated conflicts of interest among policymakers. It has encouraged politicians to engage in heavy-handed solicitation of large donations. And it has reinforced the unfortunate public perception that public policy decisions are bought and sold in Washington.

VII. Conclusion

This review of the development of campaign finance law and practice leads me to conclude that Congress had ample justification for crafting the provisions of BCRA to deal with the problems of party soft money and electioneering communications in the guise of issue advocacy. The weight of scholarly evidence supports the view that the FECA regime was undermined by the emergence of soft money and "issue advocacy," raising serious concerns about potential corruption in the policy process and disrespect for the rule of law. In my view BCRA is an incremental step to repair these egregious tears in the regulatory fabric. The new law accomplishes this objective by updating existing provisions that limit contributions to political parties and

that prohibit corporate and union treasury spending in federal elections to take into account contemporary realities of campaigning.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 20, 2002

/s/ Thomas E. Mann

Thomas E. Mann

[Attachments and references omitted]

List of Tables and Chart

Table 1:	State Limits on Contributions to Political Parties by Donor, 2000
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[Table 1 omitted]

Table 2.
National Political Party Spending, 1976-2000 ($ Millions)

Election	Democrats			Republicans			Overall Spending			
	Federal (Hard)	Non-federal (Soft)	Total	Federal (Hard)	Non-federal (Soft)	Total	Federal (Hard)	Nonfederal (Soft) $	Nonfederal (Soft) %	Total
1976	19.4	--	19.4	40.1	--	40.1	59.5	--	0	59.5
1980	35.0	4.0	39.0	161.8	15.1	176.9	196.8	19.1	8	215.9
1984	97.4	6.0	103.4	300.8	15.6	316.4	398.2	21.6	5	419.8
1988	121.9	23.0	144.9	257.0	22.0	279.0	378.9	45.0	11	423.9
1992	171.9	32.9	204.8	256.1	47.5	303.6	428.0	80.4	16	508.4
1994	137.8	50.4	188.2	234.7	48.4	283.1	372.5	98.8	21	471.3
1996	214.3	121.8	336.1	408.5	149.7	558.2	622.8	271.5	30	894.3
1998	155.3	93.0	248.3	275.9	127.7	403.6	431.2	220.7	34	651.9
2000	265.8	244.9	510.7	427.0	252.8	679.8	692.8	497.7	42	1190.5

Sources: Anthony Corrado. *Campaign Finance Reform.* New York: Century Foundation Press, 2000, p. 70; Federal Election Commission, "FEC Reports Increase in Party Fundraising for 2000," May 15, 2001. Figures for 1976 and for nonfederal spending between 1980 and 1988 are'estimates. All other figures are provided by the Federal Election Commission.

Table 3.
National Political Party Spending, 1976-2000
(in millions of constant 2000 dollars)**

Election	Federal (Hard)	Nonfederal (Soft)	Total
1976	180.1	--	180.1
1980	411.3	39.9	451.2
1984	660.0	35.8	695.8
1988	551.5	65.5	617.0
1992	525.3	98.7	624.0
1994	432.8	114.8	547.6
1996	683.5	298.0	981.5
1998	455.5	233.2	688.7
2000	692.8	497.7	1190.5

Sources: Anthony Corrado. *Campaign Finance Reform.* New York: Century Foundation Press, 2000, p. 70; Federal Election Commission, "FEC Reports Increase in Party Fundraising for 2000," May 15, 2001. Figures for 1976 and for nonfederal spending between 1980 and 1988 are estimates. All other figures are provided by the Federal Election Commission.

**Figures were converted into constant 2000 dollars using the "Inflation Calculator," available at the Web site of the Bureau of Labor Statistics, http://www.bls.gov/cpi/home.htm.

TABLE 4.
Top 50 Soft Money Donors in 1992

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Archer-Daniels-Midland	1,374,500	277,500	1,097,000	20	80	73	27
Atlantic Richfield Co	907,958	278,317	629,641	31	69	99	1
RJR Nabisco	875,305	346,000	529,305	40	60	100	0
American Financial Corp	840,000	0	840,000	0	100	100	0
Philip Morris	824,080	227,500	596,580	28	72	100	0
Joseph E Seagram & Sons	731,637	206,910	524,727	28	72	11	89
UST Inc	652,984	127,764	525,220	20	80	100	0
Merrill Lynch	645,900	160,800	485,100	25	75	83	17
International Marketing Bureau	633,770	0	633,770	0	100	100	0

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
National Education Association	445,052	437,302	7,750	98	2	100	0
Time Warner	433,573	333,333	100,240	77	23	30	70
United Steelworkers of America	409,876	409,876	0	100	0	100	0
Kohlberg, Kravis, Roberts & Co	390,650	190,650	200,000	49	51	4	96
Chevron Corp	371,760	105,388	266,372	28	72	100	0
Goldman Sachs	350,320	101,800	248,520	29	71	25	75
Occidental Petroleum	349,030	114,950	234,080	33	67	97	3
MCA Inc	340,698	320,698	20,000	94	6	15	85
Sony Corp of America	332,650	232,650	100,000	70	30	77	23

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Democratic Governor's Association	331,574	331,574	0	100	0	100	0
Anheuser-Busch	329,280	221,200	108,080	67	33	100	0
American Intertrade Group	322,800	0	322,800	0	100	3	97
Tobacco Institute	292,202	152,275	139,927	52	48	100	0
Communications Workers of America	291,180	291,180	0	100	0	100	0
Limited Inc	288,600	41,500	247,100	14	86	100	0
MacAndrews & Forbes	286,700	146,700	140,000	51	49	100	0
Henley Group Inc	270,000	50,000	220,000	19	81	96	4

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
American Federation of State/County/Munic Employees	267,046	267,046	0	100	0	100	0
United States Surgical Group	265,200	22,800	242,400	9	91	100	0
Bechtel Group	262,797	133,450	129,347	51	49	93	7
Brown-Foreman Corp	260,449	0	260,449	0	100	100	0
IBM Corp	259,000	175,000	84,000	68	32	0	100
International Association of Firefighters	252,369	241,919	10,450	96	4	100	0
Bell Atlantic	252,325	92,625	159,700	37	63	100	0
Beneficial Corp	245,150	145,650	99,500	59	41	100	0
Forstmann, Little & Co	245,000	0	245,000	0	100	0	100

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Morgan Stanley & Co	238,827	107,850	130,977	45	55	69	31
United Auto Workers	236,965	236,965	0	100	0	100	0
Lazard Freres & Co	236,500	216,500	20,000	92	8	15	85
Waste Management Inc	236,257	30,930	205,327	13	87	64	36
Sheet Metal Workers Union	232,000	232,000	0	100	0	100	0
Pacific Telesis Group	231,427	81,300	150,127	35	65	100	0
Progressive Corp	231,300	231,300	0	100	0	0	100
Mesa Limited Partnership	231,100	1,500	229,600	1	99	100	0
Connell Co	225,100	225,100	0	100	0	100	0
Cox Enterprises	219,074	219,074	0	100	0	13	87
National Housing Center	215,000	0	215,000	0	100	100	0

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Coca-Cola Co	213,627	53,500	160,127	25	75	100	0
Axem Resources	210,200	210,200	0	100	0	0	100
Agenda for the 90's	210,000	210,000	0	100	0	100	0
Walt Disney Co	206,207	206,207	0	100	0	24	76

Source: Based on an analysis provided by the Center for Responsive Politics on September 19, 2002. "Totals" include funds donated from organization treasuries and funds given by individuals affiliated with the organization.

Table 5.
Top 50 Soft Money Donors in 1996

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
New York Republican State Committee	3,287,175	0	3,287,175	0	100	100	0
Philip Morris	3,019,414	496,518	2,522,896	16	84	100	0
Joseph E Seagram & Sons	2,050,583	1,373,438	677,145	67	33	50	50
RJR Nabisco	1,442,931	254,756	1,188,175	18	82	100	0
California Republican Party	1,350,000	0	1,350,000	0	100	100	0
Walt Disney Co	1,347,000	1,043,050	303,950	77	23	99	1
Atlantic Richfield	1,262,031	486,372	775,659	39	61	100	0
Federal Express Corp	1,157,044	592,625	564,419	51	49	98	2

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Communications Workers of America	1,150,300	1,150,300	0	100	0	100	0
MCI Telecommunications	1,005,963	646,600	359,363	64	36	99	1
AT&T	1.000,024	447,184	552,840	45	55	99	1
American Federation of St/Cnty/Munic Employees	958,462	958,462	0	100	0	100	0
Republican Party of Florida	934,746	0	934,746	0	100	100	0
News Corp	869,700	75,000	794,700	9	91	69	31
Association of Trial Lawyers of America	803,400	606,300	197,100	75	25	100	0
MacAndrews & Forbes	779,649	639,649	140,000	82	18	94	6

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Anheuser-Busch	773,057	401,107	371,950	52	48	100	0
Time Warner	761,250	365,250	396,000	48	52	83	17
Lazard Freres & Co	759,956	595,106	164,850	78	22	0	100
Eli Lilly & Co	746,835	239,850	506,985	32	68	100	0
United Food & Commercial Workers Union	733,771	733,771	0	100	0	100	0
American Airlines	711,450	398,349	313,101	56	44	100	0
Chevron Corp	708,184	176,050	532,134	25	75	100	0
DreamWorks SKG	702,400	702,400	0	100	0	0	100
Archer-Daniels-Midland Co	701,000	295,000	406,000	42	58	91	9
Michigan Republican State Committee	699,133	0	699,133	0	100	100	0

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Enron Corp	687,445	142,400	545,045	21	79	59	41
Goldman Sachs	666,075	472,500	193,575	71	29	5	95
Textron Inc	654,227	274,700	379,527	42	58	100	0
NYNEX Corp	652,802	240,347	412,455	37	63	100	0
American Financial Group	645,250	115,000	530,250	18	82	77	23
Brown & Williamson Tobacco	642,500	7,500	635,000	1	99	100	0
Laborers Union	634,588	627,088	7,500	99	1	100	0
Loral Space & Communications	632,500	601,500	31,000	95	5	0	100
Integrated Health Services	609,270	574,000	35,270	94	6	83	17
Northwest Airlines	608,900	352,400	256,500	58	42	70	30

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
American Defense Institute	600,000	0	600,000	0	100	100	0
UST Inc	595,592	68,862	526,730	12	88	97	3
Entergy Corp	592,371	295,000	297,371	50	50	98	2
Sprint Corp	585,732	409,609	176,123	70	30	100	0
Blue Cross/Blue Shield	578,793	139,635	439,158	24	76	99	1
PaineWebber	567,366	155,700	411,666	27	73	93	7
Freddie Mac	558,250	287,500	270,750	52	48	100	0
WMX Technologies	556,500	187,200	369,300	34	66	100	0
BankAmerica	554,329	192,939	361,390	35	65	100	0
Bristol-Myers Squibb	552,400	114,500	437,900	21	79	88	12

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Tobacco Institute	537,357	106,044	431,313	20	80	100	0
Travelers Group	535,410	200,349	335,061	37	63	80	20
Service Employees International Union	532,880	531,630	1,250	100	0	100	0
Milberg, Weiss et al	530,000	530,000	0	100	0	28	72

Source: Based on an analysis provided by the Center for Responsive Politics on September 19, 2002. "Totals" include funds donated from organization treasuries and funds given by individuals affiliated with the organization.

Table 6.
Top 50 Soft Money Donors in 2000

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
American Fedn of St/Cnty/Munic Employees	5,949,000	5,949,000	0	100	0	100	0
AT&T	4,398,920	1,776,269	2,622,651	40	60	95	5
Service Employees International Union	4,288,096	4,257,696	30,400	99	1	100	0
Carpenters & Joiners Union	2,873,500	2,873,500	0	100	0	100	0
Freddie Mac	2,398,250	1,025,000	1,373,250	43	57	100	0
Philip Morris	2,383,453	296,541	2,086,812	12	88	100	0
Communications Workers of America	2,355,000	2,355,000	0	100	0	100	0

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Microsoft Corp	2,317,226	966,792	1,318,384	43	57	75	25
United Food & Commercial Workers Union	2,146,450	2,146,450	0	100	0	100	0
Global Crossing	2,083,195	1,161,652	921,543	56	44	40	60
SBC Communications	1,862,228	876,621	985,607	47	53	100	0
Intl Brotherhood of Electrical Workers	1,780,000	1,780,000	0	100	0	100	0
Bristol-Myers Squibb	1,740,951	213,250	1,527,701	12	88	85	15
Enron Corp	1,671,555	532,565	1,138,990	32	68	70	30
American Federation of Teachers	1,668,000	1,668,000	0	100	0	100	0
MGM Mirage	1,563,086	713,086	850,000	46	54	100	0

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Pfizer Inc	1,558,817	160,000	1,398,817	10	90	99	1
Citigroup Inc	1,509,010	763,806	745,204	51	49	86	14
Saban Entertainment	1,496,000	1,496,000	0	100	0	21	79
National Rifle Association	1,489,222	0	1,489,222	0	100	100	0
Verizon Communications	1,473,451	573,800	899,651	39	61	99	1
Williams & Bailey	1,365,000	1,365,000	0	100	0	42	58
FedEx Corp	1,327,600	475,478	852,122	36	64	100	0
Loral Spacecom	1,291,800	1,291,250	550	100	0	0	100
American Financial Group	1,280,000	620,000	660,000	48	52	12	88
Sheet Metal Workers Union	1,255,854	1,255,854	0	100	0	100	0
Buttenwieser & Associates	1,252,500	1,252,500	0	100	0	0	100

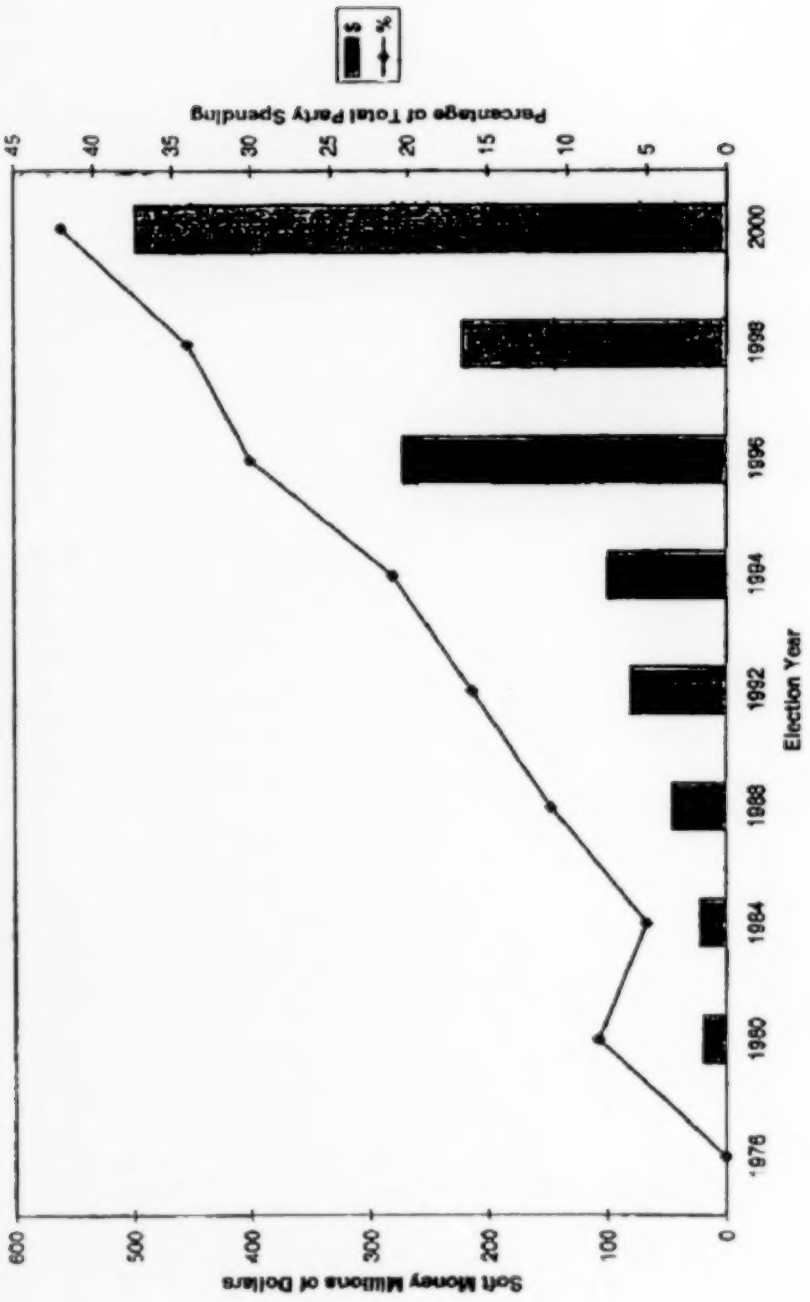
Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
MBNA Corp	1,235,905	200,000	1,035,905	16	84	60	40
Ness, Motley et al	1,230,500	1,230,500	0	100	0	100	0
Vyyo Inc	1,207,500	1,207,500	0	100	0	0	100
Angelos Law Offices/ Baltimore Orioles	1,197,900	1,172,900	25,000	98	2	22	78
Fannie Mae	1,188,650	610,800	577,850	51	49	96	4
Credit Suisse First Boston	1,185,450	443,000	742,450	37	63	36	64
Vivendi Universal	1,172,238	640,219	532,019	55	45	60	40
Lockheed Martin	1,152,350	457,500	694,850	40	60	100	0
Amway/Alticor Inc	1,138,500	0	1,138,500	0	100	32	68
Goldman Sachs	1,133,350	757,250	376,100	67	33	5	95

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Slim-Fast Foods/Thompson Medical	1,113,000	1,093,000	20,000	98	2	2	98
Blue Cross/Blue Shield	1,104,415	236,250	868,165	21	79	100	0
Limited Inc	1,080,100	300,000	780,100	28	72	88	12
United Parcel Service	1,072,871	. 195,662	877,209	18	82	100	0
America Online	1,061,205	452,750	608,455	43	57	35	65
Milstein Properties	1,044,515	1,044,515	0	100	0	0	100
UST Inc	1,041,570	53,000	988,570	5	95	99	1
American International Group	1,036,760	554,010	482,750	53	47	100	0
Association of Trial Lawyers of America	980,200	974,850	5,350	99	1	100	0

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Anheuser-Busch	968,281	413,256	555,025	43	57	100	0
Metabolife	963,000	558,000	405,000	58	42	100	0
AFLAC Inc	961,325	453,000	508,325	47	53	100	0
GlaxoSmithKline	955,695	80,900	874,795	8	92	99	1

Source: Based on an analysis provided by the Center for Responsive Politics on September 19, 2002. "Totals" include funds donated from organization treasuries'and funds given by individuals affiliated with the organization.

Chart 1.
Soft Money Spending by National Parties, 1976-2000



MOTION

Supreme Court, U.S.
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No. 09-1287

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the three-judge district court correctly held that the "soft money" provisions of Section 101 of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 82, are constitutional as applied to the Republican National Committee, its Chairman, and its state and local affiliates.

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MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the district court (J.S. App. 1a-25a) is not yet reported, but is available at 2010 WL 1140721.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 26a-27a) was entered on March 26, 2010. A notice of appeal was filed on April 2, 2010 (J.S. App. 28a-29a), and the jurisdictional statement was filed on April 23, 2010. The jurisdiction of this Court is invoked under Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 114.

STATEMENT

For more than 30 years, Congress has sought to reduce the "opportunities for abuse inherent in a regime of large individual financial contributions," *Buckley* v. *Valeo*, 424 U.S. 1, 27 (1976) (per curiam), by limiting the size of contributions that may be made to candidates and political party committees. Political donations that comply with the source-and-amount limitations imposed by the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, are known as "hard money" or "federal funds." Other political donations are known as "soft money" or "nonfederal funds."

Under BCRA Section 101, all contributions to national political parties must be made with hard money, and state and local political parties generally must use hard money to finance any "Federal election activity" they may conduct. See 2 U.S.C. 441i(a) and (b); see also 2 U.S.C. 431(20) (definition of "Federal election activity"). In *McConnell* v. *FEC*, 540 U.S. 93 (2003), this Court upheld those requirements against facial constitutional challenges. The instant appeal challenges the constitutionality of BCRA's soft-money provisions as applied to appellants.

1. The Federal Election Commission (FEC or Commission) is vested with statutory authority over the administration, interpretation, and civil enforcement of FECA and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [FECA]," 2 U.S.C. 437d(a)(8), 438(a)(8); see 2 U.S.C. 438(d); to issue written advisory opinions concerning the application of FECA and Commission regulations to any specific proposed transaction

or activity, 2 U.S.C. 437d(a)(7), 437f; and to civilly enforce FECA, 2 U.S.C. 437g (2006 & Supp. II 2008).

2. a. Since 1907, Congress has prohibited corporations from making a "money contribution" in connection with any federal election. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864-865. Congress subsequently extended the contribution prohibition to encompass labor unions, as part of its continuing effort to address "the 'political potentialities of wealth' and their 'untoward consequences for the democratic process.'" *McConnell*, 540 U.S. at 116 (quoting *United States* v. *International Union UAW*, 352 U.S. 567, 577-578 (1957)); see *id.* at 116-117. These provisions "did not deter unseemly fundraising and campaign practices. Evidence of those practices persuaded Congress to enact the [FECA] Amendments of 1974." *Id.* at 118.

The 1974 Amendments, *inter alia*, limited each individual to contributing $1000 per election per candidate and an aggregate total of $25,000 each year. See *Buckley*, 424 U.S. at 7. This Court in *Buckley* upheld those limits as constitutional. See *id.* at 12-38. Specific limits on individual contributions to national parties and to other political committees were added to FECA shortly after the decision in *Buckley*. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 486.

b. FECA's contribution limits applied to donations made for the purpose of influencing any federal election. "Donations made solely for the purpose of influencing state or local elections," by contrast, were "unaffected by FECA's requirements and prohibitions." *McConnell*, 540 U.S. at 122. The statutory scheme did not specifically address the proper treatment of donations to entities, such as national political parties, that engage in

both federal and nonfederal political activity. From 1977 to 1995, the Commission promulgated a series of regulations permitting the national political parties and their state affiliates to "fund mixed-purpose activities—including get-out-the-vote [GOTV] drives and generic party advertising—in part with soft money." *Id.* at 123; see *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 196-199 (D.D.C.) (per curiam) (discussing Commission's regulations), aff'd in part and rev'd in part, 540 U.S. 93 (2003).

Pursuant to those "allocation" regulations, political parties accumulated and transferred hundreds of millions of soft-money dollars from their national organizations to their state and local affiliates, which could spend the parties' funds on the same mixed-purpose activities but subject to more favorable allocation rules. See *McConnell*, 540 U.S. at 124, 131. In addition, the national parties themselves spent hundreds of millions of soft-money dollars—including $498 million during the 2000 election cycle alone—on putatively mixed-purpose activities that were actually intended to support the parties' candidates for federal office and were indistinguishable from the types of activities that parties and candidates are required to finance with hard money. *Id.* at 124-125. All of the soft money used to influence federal elections was, by definition, donated by either a corporation, a labor union, or an individual who had exceeded his or her contribution limit. "The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections." *Id.* at 126.

In 1998, after an extensive investigation, the Senate Committee on Governmental Affairs issued a report detailing the influence that soft money had come to wield

in the electoral process. S. Rep. No. 167, 105th Cong., 2d Sess. 105-167 (1998) (Senate Report); see *McConnell*, 540 U.S. at 129. The Senate Report concluded that the parties' ability to solicit and spend soft money, particularly on "issue advertising designed to influence federal elections," had rendered FECA's source-and-amount limitations ineffective. See *id.* at 129-132. The Senate Report also noted that the national parties had made a practice of transferring funds to the state and local parties to conduct putatively nonfederal activities "that in fact ultimately benefit[ed] federal candidates." *Id.* at 131 (brackets in original) (quoting Senate Report 4466).

3. In response to the conduct detailed in the Senate Report and similar conduct that continued during subsequent electoral cycles, Congress enacted BCRA. Title I of BCRA, entitled "Reduction of Special Interest Influence," was intended to prevent the use of soft money to influence federal elections. BCRA Section 101 prohibits national political parties and their officers from soliciting, receiving, or disbursing soft money. 2 U.S.C. 441i(a). Section 101 also prohibits state and local parties from receiving soft money for "Federal election activity," subject to one specific exemption.[1] 2 U.S.C. 441i(b); see 2 U.S.C. 431(20) (definition of "Federal election activity").

All political party committees remain free to spend unlimited amounts of hard money on any activity. BCRA does not restrict how state and local parties may

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[1] Under the "Levin Amendment," 2 U.S.C. 441i(b)(2), state and local party committees may finance certain federal election activity with a combination of hard money and "Levin funds," which are additional donations that individuals may make to a state or local party in amounts as high as $10,000 per year (to the extent permitted by the relevant state law). See *McConnell*, 540 U.S. at 162-164.

fund any undertakings other than "Federal election activity"; to the extent applicable state or local law permits, state and local parties can raise and spend unlimited individual, corporate, or union contributions for those nonfederal activities. BCRA also substantially raised the limits on contributions of hard money to national party committees (and on aggregate contributions), and it indexed those limits for inflation. See BCRA § 307(a)(2), (b) and (d), 116 Stat. 102-103.[2]

4. Immediately after BCRA was enacted, 11 complaints were filed in the United States District Court for the District of Columbia to challenge the constitutionality of various provisions of the new statute. One of those suits, *Republican National Committee* v. *FEC*, Civ. No. 02-874, was brought by the RNC, an RNC officer, and several state and local party affiliates. See *McConnell*, 251 F. Supp. 2d at 220 n.55, 225. Another suit, *California Democratic Party* v. *FEC*, Civ. No. 02-875, was brought by the California Republican and Democratic Parties. See *McConnell*, 251 F. Supp. 2d at 220 n.55, 225-227. The plaintiffs in those suits argued that BCRA unconstitutionally limited the national and state parties' receipt and disbursement of soft money for putatively nonfederal activities.

Pursuant to BCRA's judicial-review provision, the district court's judgment in the consolidated cases was appealed directly to this Court. See BCRA § 403(a)(3), 116 Stat. 114. The Court upheld BCRA Title I against the plaintiffs' facial challenge. See *McConnell*, 540 U.S. at 122-126, 133-189.

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[2] Currently, an individual may contribute $30,400 to each national party per year, and $115,500 in the aggregate for the two-year cycle. See *Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 75 Fed. Reg. 8355 (2010).

a. The Court first reiterated the holding of *Buckley*, *supra*, and subsequent cases that contribution limitations such as Title I are reviewed under an intermediate-scrutiny standard. See *McConnell*, 540 U.S. at 134-142; see also *id.* at 138 n.40 (citing cases). While recognizing that "restrictions on campaign expenditures" are subject "to closer scrutiny than limits on campaign contributions," *id.* at 134, the Court rejected the plaintiffs' contention that BCRA Title I imposes an expenditure limit. The Court explained that, although the statute both sets contribution limits and restrains the use of funds raised in excess of those limits, the latter restriction is simply a contribution regulation imposed "on the demand rather than the supply side." *Id.* at 138. BCRA, the Court concluded, "simply limit[s] the source and individual amount of donations"; it does not restrain political party committees from spending as much as they wish so long as they comply with those fundraising limits. *Id.* at 139. BCRA also leaves state and local party committees free to spend unlimited sums (however raised) on activities that are not "Federal election activity." See *id.* at 139 n.41.

Accordingly, the Court described the question before it as whether the provisions of Title I were "closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136 (internal quotation marks and citations omitted). The Court concluded that Congress had validly determined that "large soft-money contributions" to national, state, and local political parties "give rise to corruption and the appearance of corruption," *id.* at 154; see *id.* at 164-166, and that Title I's restrictions were appropriately tailored to prevent those harms, *id.* at 154-161, 166-173.

b. In concluding that prior uses of soft money had caused corruption and the appearance of corruption, the Court recounted the extensive evidence of fundraising abuses leading to BCRA. See 540 U.S. at 115-117. The Court also noted the "special relationship and unity of interest" between national parties and federal candidates and officeholders, which "has placed national parties in a unique position * * * to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *Id.* at 144-145 (quoting *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001) (*Colorado II*)). The factual record regarding such "obligated officeholders" included "evidence connect[ing] soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." *Id.* at 150. The Court accordingly rejected the plaintiffs' argument that only a "direct contribution to the candidate" can "threaten to create * * * a sense of obligation" from a candidate to a donor. *Id.* at 144.

The Court in *McConnell* also rejected the view that the interest in preventing corruption can justify, at most, regulation of "contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with, a federal officeholder or candidate." 540 U.S. at 152. The Court noted that persons seeking to gain influence over officeholders and candidates have frequently exploited loopholes in FECA, and that indirect attempts to use money to gain influence (such as through contributions to political parties) can create actual or apparent corruption that can justify congressional efforts to protect the integrity of the democratic process. See *id.* at 143-154.

The Court further held that Congress had acted permissibly in "subject[ing] *all* funds raised and spent by national parties to FECA's hard-money source and amount limits." 540 U.S. at 154; see *id.* at 154-156. The Court acknowledged that some of the RNC's soft money had historically been spent on "purely state and local election activity." *Id.* at 154 n.50. The Court explained, however, that the existence of some non-federal uses for the contributions was "beside the point" because "the close relationship between federal officeholders and the national parties, as well as the means by which the parties have traded on that relationship," had "made all large soft-money contributions to national parties suspect." *Id.* at 154-155; see *id.* at 143-154.

c. For like reasons, the Court rejected the RNC officer's challenge to the prohibition on his soliciting soft money for state and local parties, 2 U.S.C. 441i(a)(2). The Court held that the prohibition on officer solicitation "follow[ed] sensibly from the prohibition on national committees' receiving soft money." 540 U.S. at 157-158.

d. The Court also upheld the restriction (see 2 U.S.C. 441i(b)) on state and local parties' receipt of soft money for "Federal election activity" as defined in the statute. The Court explained that, "given the close ties between federal candidates and state party committees, BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations." 540 U.S. at 161. In the Court's view, "[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA," as had occurred under the earlier allocation regime, "clearly qualifie[d] as an important governmental interest." *Id.* at 165-166.

The Court further concluded that Section 441i(b) was appropriately tailored to that interest. The Court rejected the state and local parties' contention that the term "Federal election activity," as defined by BCRA, encompassed purely state or local functions that could not corrupt federal officeholders. See 540 U.S. at 166. The Court stated that the activities to which the soft-money restrictions applied—particularly "voter registration efforts, * * * voter identification, GOTV, and generic campaign activity"—"clearly capture activity that benefits federal candidates." *Id.* at 167. The Court accordingly accepted Congress's judgment that soft-money "funding of such activities creates a significant risk of actual and apparent corruption." *Id.* at 168.

Finally, the Court addressed the state and local parties' arguments regarding the prohibition on receiving soft money for advertising that promotes, attacks, supports, or opposes a federal candidate. 2 U.S.C. 431(20)(A)(iii). The Court found that, with respect to the substantial influence of such advertising on federal elections, "[t]he record on this score could scarcely be more abundant." *McConnell*, 540 U.S. at 169-170. Indeed, preventing these party-run "sham issue ad[s]" from being financed with soft money was one of the primary motivations behind BCRA. See *id.* at 129-132 (noting Senate Committee's findings that "the ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide"), 169-170. In light of the evidence regarding their influence on federal elections, the Court held that BCRA's ban on financing these communications with soft money was "closely drawn to the anticorruption interest it is intended to address," *id.* at 170, and did not unconstitu-

tionally limit state and local parties' "ability to engage in effective advocacy," *id.* at 173.

5. Appellant RNC is the national committee of the Republican Party. Appellant Michael Steele is the Chairman of the RNC. Appellants California Republican Party (California Party) and Republican Party of San Diego County (San Diego Party) are state and local committees, respectively, of the Republican Party.

One week after the November 2008 general election, appellants commenced this suit, alleging that BCRA Title I unconstitutionally limited their receipt and disbursement of soft money for certain putatively nonfederal activities. Pursuant to BCRA's judicial-review provision, appellants elected to proceed before a three-judge district court. 08-1953 Docket entry No. 2 (D.D.C. Nov. 13, 2008); see BCRA § 403(a) and (d), 116 Stat. 113-114. The Democratic National Committee, the national committee of the Democratic Party, see 2 U.S.C. 431(14), and Representative Christopher Van Hollen intervened as defendants.

The Commission moved to dismiss the complaint. The Commission argued that appellants' claims were precluded because the RNC, an RNC officer, and the California Party had unsuccessfully asserted the same causes of action in *McConnell*. All parties also cross-moved for summary judgment. At the district court's direction, the parties subsequently filed supplemental briefs to address this Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

6. In an opinion by Circuit Judge Kavanaugh, the three-judge district court granted summary judgment to the Commission. J.S. App. 1a-25a. In light of that disposition, the court dismissed as moot the Commis-

sion's motion to dismiss on preclusion grounds. *Id.* at 3a-4a, 24a n.7.

The district court held that the challenged BCRA provisions are subject to intermediate rather than strict scrutiny. J.S. App. 10a-11a. The court explained that "limits on *contributions* to candidates and political parties are subject to 'less rigorous scrutiny'" than are "limits on campaign *expenditures*," and it noted this Court's holding in *McConnell* that BCRA's soft-money provisions are properly viewed as contribution limits. *Id.* at 10a (quoting *McConnell*, 540 U.S. at 138 n.40). The court rejected appellants' contention that the soft-money provisions "function as expenditure limits when applied to [appellants'] proposed conduct." *Id.* at 11a. The court explained that this "argument flies in the face of *McConnell*, which squarely held that the level of scrutiny for regulations of contributions to candidates and parties does not turn on how the candidate or party chooses to spend the money." *Ibid.*

While recognizing that "*McConnell* permits as-applied challenges to the provisions of BCRA," the district court explained that a successful as-applied challenge to BCRA Section 101 must be based on something other than "the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision." J.S. App. 13a. The court found the RNC's claims to be factually and legally indistinguishable from the claims that the RNC had asserted and this Court had rejected in *McConnell*. See *id.* at 12a-13a. The court explained that such a challenge "is not so much an as-applied challenge as it is an argument for overruling a precedent." *Id.* at 13a.

The district court agreed with appellants that *Citizens United* had undercut some arguments for uphold-

ing BCRA Section 101. J.S. App. 13a-14a. "But that is not enough for the RNC to prevail here," the court explained, because the Court in *McConnell* had upheld Title I based on evidence "more specific" to soft money —"evidence of the *selling* of *preferential access* * * * in exchange for soft-money contributions." *Id.* at 14a. The district court concluded that the subsequent ruling in *Citizens United* had left that independently sufficient rationale undisturbed. See *ibid.*

The RNC argued that *McConnell* did not control its as-applied challenge because the RNC has pledged to cease its participation in certain abuses (encouraging federal candidates and officeholders to become involved in the party's soft-money solicitations, and providing large soft-money donors "preferential access to candidates or officeholders") at which BCRA's soft-money ban was directed. J.S. App. 14a-15a. The district court rejected that argument. *Id.* at 15a-18a. The court concluded that, in light of "the inherently close relationship between parties and their officeholders and candidates," soft-money donations to national parties would continue to cause corruption or the appearance thereof even if the RNC discontinued those specific practices. *Id.* at 17a; see *id.* at 16a-18a.

The district court also rejected the challenges to BCRA Section 101 raised by the California and San Diego Parties. J.S. App. 19a-22a. Those Parties argued that some of their proposed activities, while falling within BCRA's definition of "Federal election activity," had an insufficient connection to federal campaigns to permit federal regulation. *Id.* at 19a-20a. The court concluded that those claims were foreclosed because appellants had "not distinguished their proposed activities from the categories of state and local party activ-

ities the Supreme Court considered in *McConnell*." *Id.* at 22a. The district court further held that BCRA's ban on soft-money solicitations by the RNC Chairman in his official capacity was likewise constitutional under *McConnell* (though the court recognized that the Chairman remains free to solicit soft money in his personal capacity). *Id.* at 23a-24a. Thus, while recognizing that as-applied challenges to BCRA are cognizable, the district court held that the particular as-applied challenges raised in this case are not meaningfully different from the constitutional attacks that were raised and rejected in *McConnell*.

ARGUMENT

Based on a straightforward application of the legal principles settled by this Court in *McConnell* and prior cases, the district court correctly rejected appellants' constitutional challenges. Appellants do not urge this Court to overrule *McConnell* or any other precedent. Rather, appellants (a) suggest that their own as-applied challenges are meaningfully different from the facial challenges rejected in *McConnell*, and (b) argue that the recent decision in *Citizens United* undermines aspects of the *McConnell* Court's reasoning. Because those contentions lack merit, the appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

1. a. Applying the intermediate scrutiny it has long used in examining contribution limits,[3] the Court in

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[3] Appellants generally recognize (see J.S. 11) that intermediate scrutiny applies here. Their one suggestion that BCRA Title I might be an expenditure limit subject to strict scrutiny (J.S. 12 n.2) is flatly contrary to *McConnell*. See 540 U.S. at 138-139 (rejecting plaintiffs' "conten[tion] that we must apply strict scrutiny" to BCRA Section 101, and

McConnell held that BCRA's ban on soft-money donations to national parties was closely drawn and therefore constitutional. 540 U.S. at 154-156. The Court rejected the contention that the ban was "impermissibly overbroad because it subjects *all* funds raised and spent by national parties to FECA's hard-money source and amount limits, including * * * funds spent on purely state and local elections in which no federal office is at stake." *Id.* at 154. The Court stated that "[t]his observation is beside the point" because the challenged prohibition "regulates *contributions*, not activities." *Ibid.* The Court explained that "it is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect." *Id.* at 154-155.[4]

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holding that the provision "limit[s] the source and individual amount of donations" without "in any way limit[ing] the total amount of money parties can spend"); J.S. App. 11a. Appellants also do not contend that the inflation-adjusted limits at issue are so low as to prevent national or state parties from engaging in effective campaign-related activity. See pp. 27-28, *infra*.

[4] In describing the practices that gave rise to BCRA, the Court stated that the "special relationship and unity of interest" between national parties and federal candidates and officeholders had "placed national parties in a unique position * * * to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *McConnell*, 540 U.S. at 145 (quoting *Colorado II*, 533 U.S. at 452). The Court further explained that the record was "replete with * * * examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations," *id.* at 150, thereby helping the donors exert "undue influence" over legislation and creating the appearance of corruption arising from soft-money donations, *id.* at 154. Appellants therefore are mistaken in

The Court in *McConnell* further explained that "[g]iven this close connection and alignment of interests, large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." 540 U.S. at 155. The Court concluded that "[t]he Government's strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting all donations to national parties to the source [and] amount * * * limitations of FECA." *Id.* at 156. The Court thus made clear that the constitutionality of BCRA's ban on soft-money donations to national parties does not depend on the use to which those additional funds would otherwise be put. As the district court correctly recognized (J.S. App. 11a-18a), the Court's analysis in *McConnell* disposes of the RNC's contention (*e.g.*, J.S. 12) that national parties have a constitutional right to receive soft money so long as it is spent on allegedly non-corruptive activities.

b. *McConnell* also forecloses the constitutional challenge brought by the California and San Diego Parties. Those appellants contended below (see J.S. App. 19a-22a), and appear to reassert in this Court (see J.S. 18), that BCRA Section 101 is unconstitutional because it prohibits state and local parties from using soft money to fund certain undertakings that fall within BCRA's

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contending (J.S. 10, 15-16) that pre-*McConnell* cases such as *Colorado II*, *supra*, conclusively establish that no such relationship exists. Indeed, those cases, read in full, only undercut appellants' argument. See, *e.g.*, *Colorado II*, 533 U.S. at 455 (recognizing that parties "function for the benefit of donors whose object is to place candidates under obligation, a fact that parties cannot escape").

definition of "Federal election activity" but that (in appellants' view) cannot corrupt federal candidates.

The Court in *McConnell* considered and rejected a substantively identical challenge. See 540 U.S. at 166-171. The Court explained that the relevant BCRA provision "is premised on Congress' judgment that if a large donation is capable of putting a federal candidate in the debt of the contributor, it poses a threat of corruption or the appearance of corruption." *Id.* at 167. The Court further observed that the provision is "narrowly focused on regulating contributions that pose the greatest risk of this kind of corruption: those contributions to state and local parties that can be used to benefit federal candidates directly." *Ibid.* The Court then examined the various categories of conduct encompassed by the statutory definition of "Federal election activity," and it concluded that each of the covered activities confers sufficient benefits on federal candidates to "create[] a significant risk of actual and apparent corruption." *Id.* at 168; see *id.* at 167-171.

In rejecting the California and San Diego Parties' constitutional challenge, the district court correctly explained that appellants "do not distinguish their proposed ads from the category of state and local party advertising that the Supreme Court expressly considered in *McConnell*." J.S. App. 21a. Because appellants make no effort to refute that conclusion, *McConnell* is controlling here.

c. Indeed, a particularly striking feature of appellants' as-applied challenge is the close resemblance between the activities in which appellants now propose to engage and the activities that this Court previously considered in *McConnell*. For example, the RNC asserts a constitutional right to receive soft money to support

state and local candidates (J.S. App. 7a), particularly those in Virginia and New Jersey (see Am. Compl. ¶¶ 16-17). The RNC raised the same claim before this Court in *McConnell*, including the same arguments regarding Virginia and New Jersey. See Br. of Political Parties at 1, 9-12, 14, 19-20, 34, 40-41, 58-59, 63-64, 78-79, 86-87, *McConnell, supra* (No. 02-1727) (arguing for constitutional right to receive soft money for nonfederal elections); *id.* at 11-12 (noting RNC's "considerable 'in-house' efforts [devoted] to the Virginia and New Jersey gubernatorial and state legislative races * * * with a 'mix' of federal and nonfederal funds"). The RNC also wishes to receive soft money to finance what it calls "grassroots lobbying" (J.S. 18)—a topic exhaustively litigated and reviewed in *McConnell*. See *McConnell*, 540 U.S. at 169-170 (noting that "[t]he record on this score could scarcely be more abundant"). Appellants' other claims are similarly duplicative of their claims in *McConnell*.[5] See FEC Mem. in Supp. of Mot. to Dismiss 11-19 (showing duplication of RNC's, Chairman's, and California Party's claims). Those duplicative claims are foreclosed by this Court's rejection of the originals.[6]

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[5] Appellants refer (J.S. 6, 18) to challenging BCRA as applied to the "maintenance and upkeep" of the RNC's headquarters, but this challenge does not appear in the complaint. See J.S. App. 7a n.3 (noting differences between RNC's complaint and summary-judgment motion). In any event, the RNC raised and lost a similar building-fund claim in *McConnell*. See, *e.g.*, 251 F. Supp. 2d at 332 (Henderson, J.); *id.* at 462-463 (Kollar-Kotelly, J.); *id.* at 819 (Leon, J.) (including building funds in list of activities RNC financed with soft money prior to BCRA).

[6] By contrast, the Court in *McConnell* noted certain issues that it *did* reserve for decision in potential future as-applied challenges. See, *e.g.*, 540 U.S. at 157 n.52 (potential state-law prohibitions on soliciting hard money); *id.* at 159 (solicitations by new political parties). The instant case does not implicate any of those issues.

d. Appellants contend that, to prevail in this case, "the government must demonstrate that each application of BCRA's prohibition on nonfederal money targets an activity that, if funded by nonfederal money, would create an appreciable risk of actual or apparent *quid pro quo* corruption of federal officeholders." J.S. 10. Well before *McConnell*, however, this Court had made clear that the validity of contribution limits does not depend on that sort of particularized showing. In *Buckley*, for example, the Court "assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court nevertheless held that the difficulty of identifying those contributors who will actually seek to wield such influence, and Congress's interest in guarding against the inherent appearance of abuse, justified uniform application of the $1000 individual contribution limit.[7] *Id.* at 29-30; cf. *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 198-199 & n.19 (1981) (plurality opinion) (holding that contributions to political committees are subject to FECA's limitations even if contributions are to be used purely for administrative support). Far from requiring contribution-specific proof of likely corruptive effect, this Court has consistently upheld contribution restrictions so long as those limits are not so low as to "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21; see *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 395-396 (2000).

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[7] The Court in *Buckley* held that the basic FECA contribution limit was valid as applied to contributions from "immediate family members," even though it recognized that the "risk of improper influence is somewhat diminished" in that circumstance. 424 U.S. at 53 n.59.

2. Appellants' primary argument is that this Court in *Citizens United* repudiated the rationales on which the *McConnell* Court upheld BCRA's limits on contributions to political parties. The Court in *Citizens United* held that Congress may not constitutionally prohibit corporations from engaging in independent electoral advocacy. In rejecting the government's contention that the expenditure ban served a valid anti-corruption purpose, the Court stated that

> independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption. The BCRA record establishes that certain donations to political parties, called "soft money," were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money.

130 S. Ct. at 910-911 (citations omitted). Contrary to appellants' contention, that analysis does not cast doubt on *McConnell*'s holding that BCRA Title I is valid.

a. Most importantly, the Court in *Citizens United* emphasized that the dispute before it involved independent electoral advocacy rather than contributions. In the passage quoted above, the Court discussed (and largely discounted) the corruptive potential of "independent expenditures," and it distinguished *McConnell*'s analysis of BCRA Title I on the ground that *Citizens United* was "about independent expenditures, not soft money." 130 S. Ct. at 910-911. The Court went on to explain that "[w]hen Congress finds that a problem exists, [the Court] must give that finding due deference; but Congress may not choose an unconstitutional remedy."

Id. at 911. The Court concluded that "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy." *Ibid.*

That analysis does not mean either that soft-money contributions to political parties lack corruptive potential, or that contribution limits are an impermissible means of preventing actual or apparent corruption. Since *Buckley*, this Court has consistently held that Congress has greater latitude to limit contributions to candidates or political committees than to limit independent expenditures, both because contributions pose a greater danger of corruption and because expenditure limits trench more severely on First Amendment freedoms. See *Buckley*, 424 U.S. at 19-21, 45-47; *McConnell*, 540 U.S. at 134-137. Neither party in *Citizens United* questioned that basic distinction; rather, the dispute concerned whether corporations have the same First Amendment right as non-corporate entities to spend their own funds on independent electoral advocacy. The Court's holding that corporations have that right is in no way inconsistent with the *McConnell* Court's analysis of BCRA's limits on contributions to political parties.[8]

Indeed, the limited nature of the relief that appellants seek in this case reflects appellants' implicit recognition of the constitutional differences between contribution and expenditure restrictions. Appellants do not seek invalidation of all federal limits on contributions to political parties—the relief that would logically follow if contributions to political parties were constitutionally indistinguishable from independent expenditures, or if such contributions posed no danger of corrupting fed-

[8] The Court in *Citizens United* overruled "the part of *McConnell* that upheld [Section 203 of BCRA]," 130 S. Ct. at 913, not the part of *McConnell* that upheld Title I of BCRA.

eral officeholders. Rather, appellants appear to accept Congress's basic determination that large contributions to political parties can have a corruptive effect, and that the size of such contributions can be limited to address that danger, if the contributions are eventually used by the parties for activities that influence federal elections. Appellants argue only that the BCRA limits are unconstitutional as applied to funds ultimately spent for specified activities (see J.S. 18) that, in appellants' view, lack a meaningful connection to federal campaigns. Appellants' challenge is thus limited to the details of Congress's judgments regarding the sorts of contributions to political parties that will benefit (and thus potentially corrupt) the parties' federal candidates and officeholders. *Citizens United* does not speak to the proper disposition of that challenge.

The *Citizens United* Court's statement that "[i]ngratiation and access * * * are not corruption," 130 S. Ct. at 910, should be understood in light of that fundamental distinction between contributions and independent expenditures. Read in the context of the Court's full opinion, that statement simply reflects the Court's determination that an elected representative does not behave corruptly by feeling greater sympathy for, or giving increased access to, persons who publicly advocate on his behalf. That determination does not imply that the provision of access as a reward for infusions of cash, either to the officeholder himself or to his political party, is similarly innocuous. See *McConnell*, 540 U.S. at 153-154 (explaining that, although "mere political favoritism or opportunity for influence alone is insufficient to justify regulation[,] * * * it is the manner in which parties have *sold* access to federal candidates and officeholders

that has given rise to the appearance of undue influence").

b. In any event, the Court in *McConnell* relied not just on evidence that soft-money donors received increased access to federal officeholders, but also on "the record" of "real or apparent corruption" resulting from large donations to political parties. See 540 U.S. at 149-150. That record included concrete examples of soft-money donations leading to "manipulations of the legislative calendar," through which Members of Congress whose parties received soft money stopped legislation to which the parties' soft-money donors were opposed. See *id.* at 150. Appellants assert (J.S. 10-11; see J.S. 18-19) that there is "*no* evidence * * * [that] activities funded by nonfederal money * * * create a risk of actual or apparent *quid pro quo* corruption," and they dismiss the above-noted examples as "legislators' responsiveness to a donor's legislative priorities" (J.S. 17 n.3). That argument cannot be reconciled with the *McConnell* Court's description of these "manipulations":

> Plaintiffs argue that without concrete evidence of an instance in which a federal officeholder has actually switched a vote (or, presumably, evidence of a specific instance where the public believes a vote was switched), Congress has not shown that there exists real or apparent corruption. But the record is to the contrary. * * * To claim that such actions do not change legislative outcomes surely misunderstands the legislative process.

540 U.S. at 149-150.

3. Appellants assert that, if they win this lawsuit, (1) they will not ask federal officeholders to solicit soft money, and (2) they will not help soft-money donors gain

more access to federal officeholders than the access appellants provide their largest hard-money donors. See J.S. 6-7, 9-10, 15. Appellants argue that these self-imposed behavioral limits would eliminate the corruptive potential of soft-money donations, thus rendering BCRA's soft-money provisions unconstitutional as applied to appellants. That argument lacks merit.

a. In sustaining BCRA's soft-money provisions, the Court in *McConnell* rejected the argument that only "contributions made at the express behest of" a federal officeholder raise corruption concerns. 540 U.S. at 152. Quite apart from candidate solicitations, the inherent "special relationship and unity of interest" between national parties and federal candidates and officeholders "has placed national parties in a unique position, 'whether they like it or not,' to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *Id.* at 145 (quoting *Colorado II*, 533 U.S. at 452). With respect to state parties, the use of soft-money donations to finance "Federal election activity" likewise has a clear potential to produce obligated officeholders, see *id.* at 167, regardless of who solicits the donations.

The Court in *McConnell* reviewed extensive evidence demonstrating that soft money was often requested, not by officeholders themselves, but rather by professional lobbyists channeling funds to political parties in exchange for influence over the officeholders. For example, when the Court discussed the "troubling * * * evidence in the record showing that national parties have actively exploited the belief that contributions purchase influence," the Court cited a corporate soft-money donor's description of solicitations by lobbyists. *McConnell*, 540 U.S. at 148 n.47. Even when soft-money donations were solicited by persons other than officeholders,

officeholders were well aware of who the biggest soft-money donors were. See *McConnell*, 251 F. Supp. 2d at 853-854 (Leon, J.) ("[Y]ou cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party.") (quoting former Senator Bumpers); see also *McConnell*, 540 U.S. at 147 ("[F]or a Member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves.") (brackets in original) (quoting *McConnell*, 251 F. Supp. 2d at 488 (Kollar-Kotelly, J.)). The Court's analysis in *McConnell* does not suggest that the corruptive potential of large soft-money donations would be eliminated or even meaningfully reduced if federal candidates and officeholders were no longer asked to solicit such contributions.

b. Appellants' offer to cease providing soft-money donors with preferential access to federal officeholders does not distinguish this case from *McConnell*. To the contrary, the RNC asserted in that case that it did not "arrange meetings with government officials for any of its donors—federal or non-federal." *McConnell*, 251 F. Supp. 2d at 351 (Henderson, J.) (citing testimony of RNC finance officer). Yet voluminous record evidence that the RNC facilitated its soft-money donors' access to federal officials is exhaustively catalogued in the *McConnell* district court's opinion. See *id.* at 481-512 (Kollar-Kotelly, J.). And the record in the instant case demonstrates that appellants still arrange frequent meetings, receptions, dinners, and other events at which their major donors discuss legislation with federal candidates and officeholders. See 08-1953 Docket entry No. 56, FEC Statement of Material Facts ¶¶ 7-11 (D.D.C. Apr. 10, 2009) (Statement of Material Facts).

c. If (as *McConnell* squarely holds) BCRA's limits on soft-money donations to political parties are otherwise valid anti-corruption measures, nothing in this Court's decisions suggests that appellants can render those limits invalid as applied simply by pledging to implement their own alternative anti-corruption policies. No one would suggest, for example, that the FECA limits on individual contributions to federal candidates are unconstitutional as applied to candidates who promise not to give preferential treatment to larger donors. Any effort to enforce appellants' pledge would require the FEC to police the interactions between appellants and Republican candidates and officeholders (to determine whether appellants have urged candidates and officeholders to solicit soft-money donations) and between the party and its donors (to determine whether appellants have helped soft-money donors to gain preferential access). A chief virtue of contribution limits, however, is that they avoid the need for such difficult and intrusive inquiries. Cf. *McConnell*, 540 U.S. at 153 (explaining that, because an officeholder's decision to act "according to the wishes of those who have made large financial contributions * * * is neither easily detected nor practical to criminalize," the "best means of prevention is to identify and remove the temptation").[9]

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[9] The district court's confidence (J.S. App. 8a n.4) that appellants' pledge could be enforced was misplaced. The Commission's investigative authority, 2 U.S.C. 437g(a)(2), requires a complaint, or information regarding a violation of law, in order to initiate an investigation. It is unlikely that the RNC's facilitation of a private meeting between a wealthy donor and a Member of Congress, or a party official's communication encouraging a Republican officeholder to solicit soft-money donations, would come to light under either of those statutory conditions. Nor did the district court identify any statutory authority for the

4. Appellants have not demonstrated that BCRA's soft-money restrictions prevent them from raising sufficient funds to engage in effective electoral activity. To the contrary, in each election cycle since BCRA, the national party committees raised amounts of hard money—between approximately $900 million and $1.24 billion in hard money in each election cycle—that are comparable to or greater than the amounts raised in hard and soft money *combined* before BCRA.[10] See 08-1953 Docket entry No. 56, FEC Mem. in Supp. of Mot. for Summ. J.

Commission to "adopt regulations requiring * * * disclosures" of donors invited by the party to meet with officeholders, J.S. App. 9a n.4.

[10] These factual developments run counter to the projections that the RNC made in *McConnell*. Despite the fact that BCRA raised and indexed for inflation the hard-money limits on contributions to political parties, see p. 6, *supra*, the RNC predicted in that case that it would "*not* be able to recoup these lost non-federal revenues" because "it is unlikely that the RNC will be able to raise more federal money from lower-dollar contributors than it currently does." 08-1953 Docket entry No. 56, FEC Mem. in Supp. of Mot. for Summ. J. 4 (D D.C. Apr. 10, 2009) (FEC Summary Judgment Memorandum) (quoting RNC testimony). The RNC further predicted that "[t]he net effects of BCRA [would] be massive layoffs and severe reduction of * * * speech at the RNC, and reduction of many state parties to a 'nominal' existence." *McConnell*, 251 F. Supp. 2d at 698 (Kollar-Kotelly, J.) (quoting RNC brief).

In *McConnell*, however, this Court found that the plaintiff political parties had failed to establish that they would be unable to engage in effective advocacy after BCRA. 540 U.S. at 173. The Court observed that, "[i]f the history of campaign finance regulation * * * proves anything, it is that political parties are extraordinarily flexible in adapting to new restrictions on their fundraising abilities." *Ibid.* This Court was prescient: The national parties massively expanded their low-dollar contributor base, and the RNC's dire predictions about a "severe reduction" of the RNC's "speech" and marginalization of state parties have been shown to be unfounded. See FEC Summary Judgment Memorandum 3-5.

2-5 (D.D.C. Apr. 10, 2009) (discussing fundraising totals). The limit on contributions to national parties—currently set at $30,400 per year and indexed for inflation, see p. 6 & note 2, *supra*—is "closely drawn" because it is not "so low as to 'prevent[t] candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135-136 (quoting *Buckley*, 424 U.S. at 21; and *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003)); see also *Randall* v. *Sorrell*, 548 U.S. 230, 247 (2006) (opinion of Breyer, J., joined by Roberts, C.J. and Alito, J.) (same). The hundreds of millions of dollars that the parties have been able to raise after BCRA are plainly sufficient for "effective advocacy."

Appellants also contend (see J.S. 11, 22) that BCRA unconstitutionally disadvantages political parties relative to other political organizations. The Court in *McConnell* rejected the political parties' equal-protection challenge, which was premised on the same purported differential treatment, and explained "that BCRA actually favors political parties in many ways." 540 U.S. at 187-188. The national parties can receive up to $30,400 per year from each individual donor, and the state, district, and local committees of a party can receive up to a combined $10,000 per year in hard money from each individual donor. By contrast, other political committees can receive only $5000 per year from an individual donor. See 2 U.S.C. 441a(a)(1); 11 C.F.R. 110.17(b).[11]

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[11] The term "political committee" encompasses any entity, whether a corporation, union, or otherwise, that has as its "major purpose" the election or defeat of candidates, see *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986), and meets certain statutory criteria, see 2 U.S.C. 431(4).

To be sure, BCRA's soft-money limits subject political parties to source-and-amount restrictions that are not imposed on advocacy groups that fall outside FECA's "political committee" provisions. As the Court in *McConnell* explained, however, "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation." 540 U.S. at 188. "Political parties have influence and power in the Legislature that vastly exceeds that of any interest group," including the power to "select slates of candidates for elections" and the power to "determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses." *Ibid.* The Court in *McConnell* concluded that "Congress' efforts at campaign finance regulation may account for these salient differences," *ibid.*, and appellants identify no sound reason for the Court to revisit that holding.

5. Although the district court did not address the Commission's preclusion defense, that defense provides an independent basis for affirmance of the district court's judgment, at least with respect to appellants' challenges to BCRA's restrictions on national-party fundraising. The RNC and the California Party were plaintiffs in the *McConnell* litigation and are bound by the judgment entered against them. Chairman Steele is a plaintiff only by virtue of his official position as an officer of the RNC, and he is precluded by the judgment rejecting his predecessor RNC officer's identical arguments. See *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2172-2173 (2008) (discussing preclusion of nonparties based on their relationship to parties). Chairman Steele could not assert the claims of the national party in any event. And while the San Diego Party was not a plaintiff in

McConnell, it is not a national political party and therefore cannot challenge those statutory restrictions that apply only to such national organizations.

CONCLUSION

The appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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IN THE
Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,
Appellees.

On Appeal
From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLANTS OPPOSING MOTIONS TO DISMISS OR AFFIRM

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the jurisdictional statement remains accurate.

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BRIEF FOR APPELLANTS OPPOSING MOTIONS TO DISMISS OR AFFIRM

The government would evidently prefer not to defend BCRA's prohibition on nonfederal money against the substance of appellants' as-applied challenge. According to the government, *McConnell v. FEC*, 540 U.S. 93 (2003), "forecloses" appellants' as-applied claims. FEC Br. 16. But *McConnell* presented a *facial* challenge to FECA's restrictions on political parties' use of nonfederal money, and did not (and could not) resolve future *as-applied* challenges. *Cf. Wisc. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411 (2006) (per curiam).

Moreover, *McConnell*'s analysis of FECA §§ 323(a) and (b) has not stood the test of time. *McConnell* rejected a facial challenge to these speech-suppressing provisions on the ground that parties' use of nonfederal money is "likely to create actual or apparent indebtedness on the part of federal officeholders" and "buy donors preferential access." 540 U.S. at 155, 156. But this Court has since made clear that "[i]ngratiation and access . . . are *not* corruption," and that they therefore represent a constitutionally *inadequate* basis for restricting fundamental First Amendment freedoms. *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) (emphasis added). Nor do "[i]ngratiation and access" become corruption—as the government suggests (at 20)—simply because they are generated by a donation to an officeholder's political party, rather than by an independent expenditure supporting the officeholder's candidacy. Indeed, the government does not even attempt to explain why the gratitude that an officeholder would purportedly feel as a result of a modest donation to his party's redistricting efforts, for ex-

ample, is a constitutionally sufficient basis for prohibiting that donation—while the undeniably deeper gratitude that an officeholder would feel toward a supporter who funds a multi-million-dollar independent advertising campaign would not be. If advertising *expressly* supporting a candidate does not give rise to corruption concerns, it cannot possibly be the case that a donation to a party's redistricting efforts, get-out-the-vote drive, or headquarters maintenance fund—which would have, at most, only attenuated benefits for a candidate—could generate a risk of corruption sufficient to justify restricting core political speech.

Because the question presented is substantial and has profound implications for the First Amendment rights of political parties and their members, probable jurisdiction should be noted.

ARGUMENT

Political speech and association are "essential mechanism[s] of democracy." *Citizens United*, 130 S. Ct. at 898; *see also NAACP v. Button*, 371 U.S. 415, 431 (1963). The government nevertheless contends that appellants' First Amendment challenge to FECA § 323 is not only without merit but utterly *insubstantial*—and thus unworthy of this Court's plenary consideration—because *McConnell* purportedly "disposes" of appellants' claims. FEC Br. 16. The government is wrong.

This Court has made clear that, where a facial challenge fails, "whatever overbreadth may exist" in a statute restricting speech "should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). Indeed, "[a]s-applied challenges are the basic build-

ing blocks of constitutional adjudication," and "[i]t is neither [this Court's] obligation nor within [its] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (internal quotation marks omitted).

McConnell is consistent with that "tradition[ ]." It held that FECA §§ 323(a) and (b) are not unconstitutional in substantially all their applications, but did not consider the constitutionality of any *particular* application of those speech restrictions—which was left for resolution in future as-applied challenges such as this. *See United States v. Raines*, 362 U.S. 17, 21 (1960) ("it would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation") (internal quotation marks omitted).[1]

The government therefore cannot evade the task of defending the constitutionality of applying FECA §§ 323(a) and (b) to each of the specific activities that appellants seek to fund with nonfederal money. In light of the sheer breadth of BCRA's prohibition on political parties' use of nonfederal money—and the First Amendment principles recently reaffirmed by this Court in *Citizens United*—that task is an impossible one.

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[1] The government's cursory invocation of a preclusion defense fails for the same reason. FEC Br. 29-30. It would be flatly inconsistent with this Court's preference for as-applied constitutional adjudication to bar a party who unsuccessfully litigated a facial challenge from subsequently pursuing an as-applied challenge to the same statute. *See Broadrick*, 413 U.S. at 615-16.

Indeed, FECA § 323's prohibitions are virtually limitless in their scope. Under the guise of regulating federal elections, Congress has prohibited national political parties, such as the Republican National Committee ("RNC"), from using nonfederal money for *any* purpose. 2 U.S.C. § 441i(a)(1). Thus, whenever the RNC spends money to support a state candidate in a state election (even if there are no federal candidates on the ballot), to finance post-census redistricting litigation, to educate voters about issues pending in state legislatures, or even to remodel its headquarters, it must use funds that comply with the onerous source and amount restrictions imposed by federal law. Similarly, Congress has prohibited state and local political parties, such as the California Republican Party and Republican Party of San Diego County, from using nonfederal funds to conduct voter-registration drives and get-out-the-vote campaigns in support of *state* and *local* candidates if those candidates appear on the same ballot as candidates for federal office. *Id.* § 441i(b)(1).

Even the FEC itself has recognized that FECA § 323 extends to activities that have absolutely no connection to federal elections. In an Advisory Opinion issued on May 7, 2010, the FEC unanimously concluded that the use of funds "to pay for . . . litigation costs that arise" out of the "legislative redistricting process" is "not in connection with a Federal . . . election." App., *infra*, at 2a, 3a. Accordingly, the use of such funds does not implicate the restrictions that FECA § 323(e) imposes on federal officeholders when they raise or spend funds "in connection with" a federal election. *Id.* at 3a; *see also* 2 U.S.C. § 441i(e)(1). The FEC explained that, "[a]lthough the outcome of redistricting litigation often has political conse-

quences, . . . spending on such activity is sufficiently removed that it is not 'in connection with' the elections themselves." App., *infra*, at 7a. "[N]ot all activities that may have some indirect effect on elections," the FEC emphasized, are "'in connection with'" an election. *Id.* at 5a n.3.

Confronted with the burden of demonstrating a link between the funding of activities that bear no meaningful connection to a federal election and the corruption of federal officeholders, the government again looks for a way to avoid providing a substantive response to appellants' argument. As with its effort to invoke *McConnell* to avoid the merits of appellants' as-applied challenge, the government suggests that, in fact, it need not identify *any* federal interest to justify the disputed applications of FECA §§ 323(a) and (b). According to the government, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), relieves it of the obligation of making a "particularized showing" that, if funded by nonfederal money, each political activity to which FECA § 323 applies would create a risk of corrupting federal officeholders. FEC Br. 19. "Congress's interest in guarding against the inherent appearance of abuse," the government contends, "justifie[s] *uniform* application" of FECA § 323. *Id.* (emphasis added).

The portion of *Buckley* on which the government relies, however, pertained exclusively to *contribution* limits. FEC Br. 19 (citing *Buckley*, 424 U.S. at 29-30). FECA § 323, in contrast, is not only a contribution limit but also a restriction on the type of "funds" that political parties can *"spend."* 2 U.S.C. § 441i(a)(1) (emphasis added).

In any event, even if FECA § 323 is examined only as a contribution limit, *Buckley* does not elimi-

nate the government's obligation to demonstrate that each challenged application of this speech restriction is "closely drawn" to serve a "sufficiently important" government interest. *McConnell*, 540 U.S. at 136. While *Buckley* makes clear that the government need not prove that a *particular* donor and *particular* recipient would use a prohibited contribution for an illicit purpose (424 U.S. at 29-30), the government still must demonstrate that the *class* of prohibited contributions is a type that would generate a risk of corrupting federal officeholders. If that were not the case, then there would be *no* meaningful limits at all on Congress's authority to regulate political contributions: Congress could, for example, extend the federal source and amount restrictions to *local* political parties supporting candidates in *local* elections in which no federal candidate appeared on the ballot. Not even the FEC—or, at least, not the FEC's *Commissioners* (who issue advisory opinions but do not necessarily direct the course of litigation)—would claim such limitless federal authority over purely local elections. Thus, in this case, it is the government's obligation to demonstrate that the application of FECA § 323 to each challenged class of activity furthers its interest in preventing the actual or apparent corruption of federal officeholders.

The government does not dispute that this anticorruption interest is the only interest that could be constitutionally sufficient to sustain a restriction on political parties' First Amendment right to raise and spend nonfederal money. Indeed, the government characterizes FECA § 323 as a "valid anti-corruption measure[ ]" (FEC Br. 26), and fails to identify any other interest that could potentially support that restriction. According to the government, however, the anticorruption interest extends beyond the preven-

tion of classic *quid pro quo* arrangements to the eradication of any political activity that might facilitate "access" to federal officeholders. FEC Br. 22. Intervenor similarly argues that "Congress may limit contributions to avoid the risks of favoritism toward and improper influence by large contributors." Int. Br. 19 (capitalization altered).

These arguments are squarely foreclosed by *Citizens United*, which held that the "fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." 130 S. Ct. at 910. "Reliance on a generic favoritism or influence theory," the Court continued, "is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Id.* (internal quotation marks omitted).

As the three-judge district court correctly recognized below, the fact that *Citizens United* arose in the expenditure setting does not undermine its force in this case. J.S. App. 13a-14a. "Favoritism and influence are not . . . avoidable in representative politics" and thus do not constitute corruption (*Citizens United*, 130 S. Ct. at 910)—whether they are the product of a contribution, an independent expenditure, or a nonfinancial form of political expression. Ingratiation and access do not somehow become more nefarious—and more damaging to our political system—simply because they are the product of a contribution. *See id.* ("The appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.").

Without its "favoritism or influence theory," the government must establish that BCRA's prohibition on nonfederal money is "closely drawn" to further the government's interest in eradicating actual and ap-

parent *quid pro quo* corruption of federal officeholders. *See Citizens United*, 130 S. Ct. at 909 (the "governmental interest in preventing corruption . . . [is] limited to *quid pro quo* corruption"). But there was no evidence before Congress—and no evidence before this Court in *McConnell*—that political parties' solicitation and expenditure of nonfederal money was a vehicle for illicit *quid pro quo* arrangements between donors and federal officeholders. J.S. 17. In fact, the *McConnell* district court expressly found that the "record contain[ed] no evidence of quid pro quo corruption." *McConnell v. FEC*, 251 F. Supp. 2d 176, 851 (D.D.C. 2003) (Leon, J.); *id.* at 481 (Kollar-Kotelly, J.) (the "record does not contain any evidence of bribery or vote buying in exchange for donations of nonfederal money").

In the face of this unambiguous district court finding, neither the government nor intervenor is able to identify any evidence that political parties' use of nonfederal funds gave rise to *quid pro quo* arrangements with federal officeholders. The only potential support that the government and intervenor can muster is this Court's statement in *McConnell* that "evidence connect[ed] soft money to manipulations of the legislative calendar." 540 U.S. at 150 (citing 251 F. Supp. 2d at 482 (Kollar-Kotelly, J); 251 F. Supp. 2d at 852 (Leon, J.)). But, the purported "connect[ion]" was not (and was not alleged to be) a *quid pro quo* arrangement in which nonfederal money was exchanged for an officeholder's agreement to "manipulat[e]" the "legislative calendar"—the classic exchange of "dollars for political favors" that this Court has described as the "hallmark of corruption." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). The example referenced on the cited pages of the district court's

opinion instead involved Congress's amendment of a bill without a hearing in response to concerns raised by a donor of nonfederal money. *See* 251 F. Supp. 2d at 482 (Kollar-Kotelly, J.); *id.* at 852 (Leon, J.). Such legislative "favoritism" toward campaign supporters is *not* corruption. *Citizens United*, 130 S. Ct. at 910; *cf. McCormick v. United States*, 500 U.S. 257, 272 (1991) ("to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents . . . shortly before or after campaign contributions are solicited . . . would open to prosecution . . . conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions").

The government's defense of FECA §§ 323(a) and (b) is thus both legally flawed and factually insupportable. Plenary review is necessary to eliminate the unconstitutional restrictions that these provisions impose on the fundamental speech and associational rights of political parties and their members.[2]

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[2] That some political parties have been successful in raising "hard money" in recent election cycles does not alleviate FECA § 323's constitutional shortcomings. FEC Br. 27. A restriction on core political speech cannot withstand First Amendment scrutiny simply because it preserves other modes of political expression. *See, e.g., Citizens United*, 130 S. Ct. at 897 (invalidating prohibitions on corporate independent expenditures even though those prohibitions did not apply to corporations' use of PACs to fund political speech).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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June 7, 2010

APPENDIX

APPENDIX A

FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 7, 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2010-03

Marc E. Elias, Esq.
Kate S. Keane, Esq.
Perkins Coie LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2003

Dear Mr. Elias and Ms. Keane:

We are responding to your advisory opinion request on behalf of the National Democratic Redistricting Trust ("the Trust"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of funds by Members of Congress on behalf of the Trust. The Commission concludes that the Trust's proposed activities are not in connection with an election and therefore Members of Congress may solicit funds on behalf of the Trust that do not

comply with the Act's amount limitations and source prohibitions.

Background

The facts presented in this advisory opinion are based on your letter dated February 19, 2010, your email dated March 2, 2010, your comment submitted on April 28, 2010 and your representations at the Commission's Open Meeting on April 29, 2010.

The Trust was established by individuals, but not Members of Congress, to raise funds to pay for the pre-litigation and litigation costs that arise following the next legislative redistricting process.[1] The Trust is run by a trustee and an executive director, both of whom are private citizens and neither of whom are Members of Congress. The Trust is not directly or indirectly established, financed, maintained, or controlled by any Member of Congress, any authorized candidate committee, or any national, State, district, or local party committee.

Though the Trust may work in concert with like-minded individuals, organizations, and political committees that will attempt to influence elections directly, the Trust itself will not fund direct attempts to influence elections. Indeed, the Trust will not use its funds to pay for communications that expressly advocate the election or defeat of any clearly identified candidate for office, nor will any of its solicitations of funds expressly advocate the election or defeat of any clearly identified candidate for office.

The Trust would like Members of Congress to solicit funds on its behalf. Such solicitations would

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[1] The Trust will also spend some of its funds on administrative costs (*e.g.*, to pay the executive director's salary).

seek funds that do not comply with the Act's amount limitations or source prohibitions, and also would not advocate the election or defeat of any candidate for office.

Question Presented

May Members of Congress solicit on behalf of the Trust funds that do not comply with the Act's amount limitations and source prohibitions?

Legal Analysis and Conclusions

Yes, Members of Congress may solicit funds on behalf of the Trust that do not comply with the Act's amount limitations and source prohibitions because the Trust's proposed activities are not in connection with a Federal or non-Federal election.

On November 6, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002) ("BCRA") took effect. As amended by BCRA, the Act regulates certain actions of Federal candidates and officeholders ("covered persons") when they raise or spend funds "in connection with" either Federal or non-Federal elections. 2 U.S.C. 441i(e)(1). Both BCRA and the Commission's regulations implementing BCRA prohibit covered persons from soliciting, receiving, directing, transferring, or spending any "funds in connection with an election for Federal office" unless such funds are "subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61. BCRA and the Commission's regulations also prohibit covered persons from soliciting, receiving, directing, transferring or spending any "funds in connection with an election other than an election for Federal office" unless the funds are consistent with the Act's amount limitations and source prohibitions. 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.62.

In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether the Federal candidate or officeholder is soliciting funds in connection with a Federal or non-Federal election under subsection (e)(1). If so, then the analysis proceeds to whether the exceptions to subsection (e)(1) in subsections (e)(2) or (e)(4) apply. If the funds are not raised or spent in connection with an election, then the funds do not fall within the scope of section 441i(e).

The Commission has issued several advisory opinions concerning whether certain activities are in connection with an election since the passage of BCRA that provide guidance in this matter.[2] For example:

- In Advisory Opinion 2003-12 (Flake), the Commission concluded that the activities of a ballot measure committee that is not 'established, financed, maintained or controlled' by a Federal candidate . . . are not 'in connection with an[] election . . . prior to the committee

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[2] Before 2 U.S.C. 441i(e) became law, the Commission approved proposals by Federal candidates or officeholders to establish and to solicit funds for entities that were engaged exclusively in activities related to redistricting, including the defrayal of reapportionment-related legal expenses. The issue raised by these requests was whether the funds solicited or spent for such activities were "for the purpose of influencing any election to Federal office" and therefore contributions or expenditures under 2 U.S.C. 431(8) and (9). The Commission concluded that activity related to redistricting, although a political process, does not fall within those definitions. *See* Advisory Opinions 1990-23 (Frost), 1982-37 (Edwards) and 1981-35 (Thomas). Accordingly, the Commission determined that the redistricting-related entities described in the requests were permitted to receive and spend funds that were not subject to the limitations and prohibitions of the Act.

qualifying an initiative or ballot measure for the ballot, but are 'in connection with an[] election . . . ' after the committee qualifies an initiative or ballot measure for the ballot."

- In Advisory Opinion 2003-15 (Majette), the Commission concluded that Representative Majette's costs of defending against a lawsuit seeking a special primary and special general election—which, if successful, would have essentially overturned the primary and general elections that Representative Majette had won—were not "in connection with" any election.[3]
- In Advisory Opinion 2005-10 (Berman-Doolittle), the Commission concluded that section 441i(e) does not prohibit Federal candidates and officeholders from raising funds for committees that have been formed solely to support or oppose ballot measures (including a ballot measure specifically related to redistricting). Under the facts presented by the requester, the committees were not established, financed, maintained or controlled by a Federal candidate, officeholder, or anyone acting on their behalf, or by any party committee and there were no Federal candidates appearing on the same ballot.

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[3] As this advisory opinion demonstrates, not all activities that may have some indirect effect on elections are encompassed by the "in connection with" standard of BCRA. *But see* Advisory Opinion 2006-24 (NRSC/DSCC) (concluding that "any recount fund established by a Federal officeholder or candidate is subject to 2 U.S.C. 441i(e)(1)(A)").

The Commission's regulation regarding fundraising for convention host committees also provides useful context for applying the "in connection with" an election standard. 11 CFR 9008.55(d). In that rulemaking, the Commission considered whether a statutory exemption to BCRA's fundraising limitations applied to candidate solicitations for convention host committees and municipal funds. *See* 2 U.S.C. 441i(e)(4)(A); Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47386, 47404-05 (Aug. 8, 2003). As part of its analysis, the Commission found that the principal purpose of the host committees and municipal funds was to promote and generate commerce in the host cities. The convention itself clearly has some impact on an election - it is, after all, where the party chooses its nominee. However, the Commission determined that the specific purpose of host committees and municipal funds (namely, to promote commerce in the host cities) was not principally for the purpose of conducting federal election activity "in connection" with a Federal election. *Id.*

Here, the Trust's proposed activities are most closely in line with those approved by the Commission in Advisory Opinion 2003-15 (Majette) and Advisory Opinion 2005-10 (Berman-Doolittle).[4] The

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[4] In response to Advisory Opinion Request 2003-38 (Engel), the Commission failed to reach a conclusion with respect to the proposed redistricting related activity. In that request, Congressman Engel sought to establish a redistricting committee for the purpose of paying the costs of redistricting litigation. Here, in contrast, the Trust will not be directly or indirectly established, financed, maintained, or controlled by any Member of Congress, any authorized candidate committee, or any national party committee.

regulation regarding candidate solicitations for convention host committees also provides support for the Request. The Trust seeks to engage in litigation over the electoral process that will govern how future elections are conducted, but its activities will not be a means to participate in those elections. BCRA does not explicitly address whether redistricting activities are "in connection with" elections. Although the outcome of redistricting litigation often has political consequences,[5] the Commission concludes that spending on such activity is sufficiently removed that it is not "in connection with" the elections themselves.

The Commission concludes, in light of the Commission's recent decisions on this question, that donations to the Trust for the sole purpose of paying the pre-litigation and litigation costs associated with reapportionment and redistricting legal matters are neither "in connection with an election for Federal office" nor "in connection with any election other than an election for Federal office" for purposes of 2 U.S.C. 441i(e)(1)(A) and (B). As such, the funds are not subject to the limitations and prohibitions of the Act. Accordingly, a Member of Congress may solicit unlimited funds on behalf of the Trust to defray the legal expenses associated with the Trust's redistricting efforts.

The Commission expresses no opinion regarding the possible applicability of any Federal or State tax laws or other laws, or the rules of the Senate or House of Representatives, to the matters presented

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[5] *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences.").

in your request, as those issues are outside its jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinions are available on the Commission's website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

(signed)
Cynthia L. Bauerly
Vice Chair

RESPONSE

No. 09-1287

IN THE SUPREME COURT OF THE UNITED STATES

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia

RESPONSE TO MOTION TO EXPEDITE OF APPELLEE REPRESENTATIVE CHRISTOPHER VAN HOLLEN, JR.

Appellee Representative Christopher Van Hollen, Jr. respectfully responds to Appellants' Motion to Expedite.

1. Appellants first request that the Court deny or limit any extension of time to respond to the pending Jurisdictional Statement. Before filing their motion, Appellants contacted the Solicitor General, who indicated that the United States does not intend to seek an extension. Representative Van Hollen also does not intend to seek an extension of time. We further understand that the third Appellee, the Democratic National Committee, does not intend to seek an extension of time. Accordingly, the relief sought is unnecessary.

2. Appellants further request that the Court expedite merits briefing and argument. That relief is also unnecessary. As the decision of the three-judge panel

below correctly concluded, Appellants' arguments are foreclosed by this Court's decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), which addressed and decided the precise issues presented—and, indeed, rejected the same arguments made by many of the same parties to this case. Moreover, nothing in the Court's decision in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), undermined the long-settled distinction between the constitutional treatment of *expenditure* and *contribution* limits, nor undercut the line of decisions from *Buckley v. Valeo*, 424 U.S. 1 (1976), to *McConnell* upholding the application of contribution limits to political parties. Accordingly, after considering the Jurisdictional Statement and Appellees' responses, it would be entirely appropriate for this Court to summarily affirm the decision below. If the Court summarily affirms, of course, there will be no need for further expedited action.

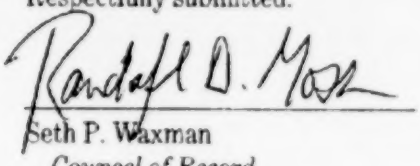
Alternatively, were the Court to note probable jurisdiction and to consider re-examining *McConnell* and *Buckley*, the congressional goal that the case be "expedite[d] to the greatest extent possible"[1] would be satisfied by an ordinary briefing schedule, which would permit the case to be heard during the Court's first regular sitting in October. Expediting briefing and argument more than that would be inadvisable and would serve no practical purpose. Many interested parties would presumably want to be heard as *amici*, and even assuming the case were briefed and argued before the

[1] Bipartisan Campaign Reform Act of 2002 ("BCRA") § 403(a)(4), Pub. L. No. 107-155, 116 Stat. 81, 113-14.

beginning of the October Term 2010, it is unlikely that the Court would issue an opinion significantly in advance of the November 2010 elections.

Accordingly, under either scenario, the relief Appellants seek is unnecessary.

Respectfully submitted.



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May 3, 2010

No. 09-1287

IN THE SUPREME COURT OF THE UNITED STATES

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 3rd day of May 2010, I caused a copy of the foregoing Response To Motion To Expedite Of Appellee Representative Christopher Van Hollen, Jr. to be served by FedEx Overnight Mail and e-mail on the counsel identified below, pursuant to Rule 29.5 of this Court. All parties required to be served have been served.

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